No. 73-1888

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALASKA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

WALLACE H. JOHNSON,
Assistant Attorney General,

GERALD P. NORTON,
Assistant to the Solicitor General,

BRUCE C. RASHKOW,
EDWARD F. BRADLEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The memorandum opinion of the district court (App. B, *infra*) is reported at 352 F. Supp. 815. The findings of fact and conclusions of law of the district court (App. C, *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1974 (App. D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The case involves a determination whether the waters of Cook Inlet in Alaska are historic inland waters under principles of international law. If they are, the State of Alaska has exclusive jurisdiction over the waters of and lands beneath the Inlet as against the United States and foreign nations, and it would be free to proceed with a proposed sale of oil and gas leases covering submerged lands more than three miles from the shore of Cook Inlet. If they are not historic inland waters, the portions of the Inlet more than three miles from the shore are high seas and the submerged lands are part of the Outer Continental Shelf as to which Alaska would have no authority to make the proposed leases since any leasing authority would be in the United States.

The following questions are presented:

1. Whether, despite the absence of any explicit claim to Cook Inlet as inland waters or of any sovereign acts interfering with the navigational rights of foreign nations to innocent passage therein, there has been a sufficient and continuous exercise of sovereignty to establish historic title to Cook Inlet as inland waters.

2. Whether, despite the absence of positive approval or affirmative acquiescence by foreign nations in the exercise of sovereignty over the waters of Cook Inlet as if inland waters, the nonopposition of foreign nations was sufficient acquiescence to establish a claim to historic title.

3. Whether repeated disclaimers of sovereignty over Cook Inlet by the United States should not have been given their normally conclusive effect (a) where the court of appeals found that the evidence presented "close" questions as to the legal inferences to be drawn as to whether historic title had previously ripened, or (b) because the district court found the disclaimers to be of "low reliability" after investigating the circumstances of their preparation.

4. Whether the "clearly erroneous" test governed the court of appeals' review of the district court's resolution of questions of international law and other legal issues in this case.

STATUTES INVOLVED

Sections 2, 3, 4 and 9 of the Submerged Lands Act of 1953, 67 Stat. 29, *et seq.*, 43 U.S.C. 1301, 1302, 1311, 1312, provide in relevant part as follows:

> SEC. 2. When used in this Act—
>
> (a) The term "lands beneath navigable waters" means—
>
> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the

Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open

sea and the line marking the seaward limit of inland waters;

* * * * *

SEC. 3. RIGHTS OF THE STATES.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources * * *.

* * * * *

SEC. 4. SEAWARD BOUNDARIES.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its

coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

* * * * *

SEC. 9. RESOURCES SEAWARD OF THE CONTINENTAL SHELF.—Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

STATEMENT

This case presents important questions concerning the proper legal standards governing the application of principles of international law that control the determination of conflicting claims by the United States

and the State of Alaska as to the boundaries of the United States seaward of Alaska and ownership of offshore lands under the waters of Cook Inlet.

International law recognizes a threefold division of the sea: (1) "inland" or "internal" waters, consisting of bodies of water, such as bays, within the land territory of a nation, and over which it may exercise complete sovereignty, including the right to exclude foreign vessels; (2) the "territorial" or "marginal" sea, consisting of the waters within a specified distance seaward (three miles for the United States) of the coast and inland waters of a nation, and over which it may exercise complete sovereignty, except that foreign vessels have the right of "innocent passage" through such waters upon observance of special regulations concerning navigation, customs and the like; and (3) the "high seas," lying seaward of the territorial sea, as to which a nation may not normally exercise sovereignty with regard to foreign vessels or foreign nationals (although it may as to its own nationals).[1] *United States* v. *Louisiana*, 394 U.S. 11, 22-23. See generally I Shalowitz, *Shore & Sea Boundaries* 22-25 (1962).

In the Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. 1301, *et seq.* ("the Act")), Congress re-

[1] In the portion of the high seas adjacent to the territorial sea, and known as the "contiguous zone," a coastal nation may exercise control for certain special purposes. See generally 1 Shalowitz, *Shore & Sea Boundaries* 238-241 (1962). Within that zone the United States has established exclusive fisheries jurisdiction between three and twelve miles from its coast line. 16 U.S.C. 1091, *et seq.*

linquished to the states the United States' interest in lands beneath navigable waters within state "boundaries" (43 U.S.C. 1311(b)), and confirmed to each state admitted subsequent to the formation of the Union a seaward boundary of three geographic miles from its "coast line" (43 U.S.C. 1312), the latter term being defined with reference to the seaward limit of "inland waters." 43 U.S.C. 1301(c). The Act left unaltered the rights of the United States to the natural resources in the portions of the Continental Shelf lying seaward and outside of the seaward boundaries of the states (43 U.S.C. 1302), which submerged lands are referred to as the Outer Continental Shelf. 43 U.S.C. 1331(a).

Although the Act does not define "inland waters," this Court has held that the definition to be used in applying the Act is that subsequently adopted in the Convention on the Territorial Sea and the Contiguous Zone (T.I.A.S. No. 5639). *United States* v. *California*, 381 U.S. 139, 161-167; *United States* v. *Louisiana*, *supra*, 394 U.S. at 32-35. In brief, Article 7 of the Convention, dealing with bays, sets forth a rule under which the width at the closing line of a bay cannot exceed 24 miles. See *United States* v. *California*, *supra*, 381 U.S. at 169, n. 36. This limitation is inapplicable, however, to so-called "historic" bays. 381 U.S. at 169 n. 36, 172-175.

The Convention does not define "historic" bays or inland waters, but this Court has adopted the general principles of international law that govern the definition of such historic waters, and has acknowledged that there is general agreement on three criteria: (1) exercise of authority over the area by the Nation claiming the right; (2) continuity of the exercise of this authority for a considerable time; and (3) the acquiescence of foreign nations in the exercise of authority. *United States* v. *Louisiana*, *supra*, 394 U.S. at 23-24, 74-75; see *United States* v. *California*, *supra*, 381 U.S. at 172.

Although Alaska was not admitted to the Union until January 3, 1959, and hence was not a "state" in 1953 for purposes of the Act (43 U.S.C. 1301(g)), the Alaska Statehood Act provided that the Submerged Lands Act shall be applicable to Alaska and that Alaska "shall have the same rights as do existing States thereunder." Section 6(m), 72 Stat. 343, 48 U.S.C. ch. 2, note.[2]

Cook Inlet is a deep penetration into the Alaskan coast line, at the upper end of which is Anchorage. (A map showing Cook Inlet and the area in dispute is set forth at Appendix J, *infra*.) In March 1967, the State of Alaska offered 2,500 acres of submerged lands in lower Cook Inlet for a competitive oil and gas lease sale. This tract is located more than three geographic miles both from the shore of Cook Inlet and from an imaginary 24-mile line drawn across

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[2] The Statehood Act, enacted July 7, 1958, provided that the "State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Section 2, 72 Stat. 339, 48 U.S.C. ch. 2, note.

the Inlet at Kalgin Island. The United States contends that that line marks the seaward limits of the portion of Cook Inlet that may be regarded as inland waters because the closing line between the natural headlands at the lower end of the Inlet is 47 miles long. In short, the tract is in an area of lower Cook Inlet that the United States considers to be high seas.

Accordingly, on March 20, 1967, the United States commenced this action in the United States District Court for the District of Alaska to quiet title and for injunctive relief, on the ground that Alaska is not entitled to lease areas of high seas. Alaska contended, in response, that all of the waters in Cook Inlet are "historic" inland waters, so that it has title to the submerged lands in the entire Inlet. The parties compiled a substantial but essentialy undisputed factual record bearing on the controlling question [3] whether Cook Inlet is historic inland waters.

The district court concluded that, for purposes of the governing international law, various acts occurring when Russia owned the territory of Alaska, as well as acts taken by the United States (through statutes, regulations and acts of its employees) and the State of Alaska, constituted the exercise of sovereignty over lower Cook Inlet, and that various acts or omissions of foreign nations constituted acquies-

[3] Because the width of the Inlet at its headlands exceeds 24 miles, it is undisputed that the portions of the Inlet in question are inland waters only if the Inlet constitutes an historic bay.

cence in those exercises of sovereignty. The district court held, therefore, that all of the waters of Cook Inlet are historic inland waters, although it did not specify when that historic title ripened (see p. 15, n. 10, *infra*). In reaching this result the court disregarded repeated disclaimers by the United States, first issued prior to this litigation, that it did not regard Cook Inlet as within its jurisdiction, the court having concluded that the extent of research underlying the disclaimers made them of "low reliability" (App. B, *infra*, p. 12a; App. C, *infra*, pp. 45a-47a).

On appeal, the United States did not challenge the factual findings made by the district court.[4] Rather, it contended that, in determining that sovereignty had been continuously exercised over Cook Inlet and that foreign states had acquiesced in the exercise of such sovereignty, the district court had attributed improper legal significance to various events which indisputably occurred—in other words, that the court had applied erroneous legal standards. In addition, the United States contended that the district court erred in failing to regard as legally conclusive the United States' disclaimers of sovereignty over Cook Inlet. Without discussing any of the legal issues raised by the United States, the court of appeals af-

[4] The United States did challenge the court's refusal to make certain requested findings concerning the extent of foreign fishing in Cook Inlet by foreign vessels and the government's conclusion that such fishing could not be prohibited under international law. Since the evidence was not in dispute, the court presumably considered these matters to be legally immaterial.

firmed *per curiam* on the ground that the district court's "findings" were not "clearly erroneous" (App. A, *infra*, pp. 5a-6a).

On May 14, 1974, on the government's motion, the court of appeals recalled its mandate to the extent that it affects foreign fishing and navigation in the disputed area and stayed issuance of the mandate until June 13, 1974, or until final disposition of this case if a petition for a writ of certiorari is filed (App. E, *infra*). On June 14, 1974, the court of appeals extended the stay until June 23, 1974.

REASONS FOR GRANTING THE WRIT

1. The decision of the courts below,[5] in its legal conclusion that various acts constituted the exercise of sovereignty sufficient to establish historic title to Cook Inlet as inland waters, conflicts with this Court's decisions in *United States* v. *California, supra,* and *United States* v. *Louisiana, supra,* setting forth the legal principles applicable to a claim that a body of water is an historic bay or inland waters for purposes of the Submerged Lands Act. The mere exercise of governmental authority to some extent or at some time is not sufficient to support such a claim. Rather, there must have been such an exercise of sovereignty as could be consistent only with treatment of the waters as inland waters, rather than as territorial sea. *United States* v. *Louisiana, supra,* 394 U.S. at 24 n. 28, 25-26 n. 30. The crucial test in assessing

[5] Because only the district court specifically addressed the asserted acts of sovereignty, we shall refer to the particular determinations of that court.

the purported exercise of sovereignty, accordingly, is whether the claimant interfered with the right of innocent passage of foreign vessels, for if it allowed their innocent passage the waters would not be inland waters. *Id.* at 26, n. 30. Similarly, an exercise of sovereignty that is consistent with treatment of the waters as a territorial sea or the high seas (see pp. 13-17, *infra*) is of no legal significance in establishing a claim that the waters are inland waters. *Id.* at 25-26.[6]

Significantly, Alaska introduced no evidence, and the district court here made no finding, that there had ever been any governmental interference with the right of innocent passage by foreign vessels or foreign nationals in Cook Inlet. The conclusion of the courts below that Cook Inlet is an historic bay rests, instead, upon facts, events and conduct that are irrelevant under *United States* v. *Louisiana, supra.*

(a) The most prevalent legal error of the district court was to rely upon actions of the United States (or of Alaska) which were consistent with treatment of the waters of Cook Inlet as high seas, or at most territorial sea, rather than as internal waters. This is the case as to a variety of Acts of Congress, Executive Orders, and agency regulations governing fishing in the waters of Alaska,[7] as well as the patrol

[6] These principles are discussed and applied in the report of the Special Master in *United States* v. *Florida,* No. 52 Original, submitted February 19, 1974, pertinent portions of which are set forth in Appendix F, *infra.*

[7] This comment applies to the court's reliance upon seizure of an American vessel, The Kodiak, in 1892 for violation of

of the disputed waters by United States vessels.[8] As we have noted (see p. 13, *supra*), regulation of fishing, even by foreigners, is permissible in the territorial sea and beyond, and such conduct is irrelevant to a claim of historic title to inland waters. *United States* v. *Louisiana*, *supra*, 394 U.S. at 25-26.

(b) The court relied upon acts taken by the United States (and Alaska) to enforce laws in Cook Inlet with respect to American vessels or citizens,[9] although only the exercise of authority with respect to foreign nationals or foreign vessels is relevant in establishing historic title under international law. See, *e.g.*, Appendix F, *infra*.

(c) The court relied upon events occurring subsequent to the time (never clearly specified) when it

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Rev. Stat. 1956 (App. C, *infra*, pp. 27a-28a), enactment of the Alien Fishing Act of 1906 (34 Stat. 263, 48 U.S.C. (1958 ed.) 243) (App. C, *infra*, p. 28a) and the White Act of 1924 (43 Stat. 464, 48 U.S.C. (1958 ed.) 221) (App. C, *infra*, p. 30a), promulgation of an Executive Order by the President, November 3, 1922, No. 3752 (PX 21), establishing the Southwestern Alaska Fisheries Reservation (App. C, *infra*, p. 29a) and of regulations by the Secretary of Commerce implementing these fishing controls (App. C, *infra*, pp. 30a-31a) and the enforcement of these laws and regulations at various times in the 1950's (App. C, *infra*, pp. 31a-34a).

[8] A nation may patrol even the high seas in the enforcement of international agreements or of its own laws against its own nationals, without prejudicing the rights of foreign nationals with respect to the waters in question.

[9] This is so as to the court's reliance upon seizure of The Kodiak in 1892 (App. C, *infra*, pp. 27a-28a) and enforcement of fishing regulations by the United States in the 1950's and by Alaska in 1970 (App. C, *infra*, pp. 31a-34a, 39a).

found that historic title had already "ripened," [10] even though the court elsewhere indicated that such post-ripening events were not "relevant" (App. C, *infra*, pp. 45a, 53a, 54a).

(d) The court relied upon the isolated act of a private citizen,[11] which this Court has said cannot establish sovereignty. *United States* v. *Louisiana*, *supra*, 394 U.S. at 76, n. 103.

(e) The court relied upon actions of departments of the government that have neither the authority nor the responsibility for designating or altering international boundaries,[12] although this Court has stated that actions by the departments not responsible for foreign relations are entitled to little weight

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[10] Thus, the court held that historic title had ripened at least prior to Alaska's statehood in 1959 (App. C, *infra*, p. 53a) and "probably" prior to certain instances of foreign fishing that began as early as 1946 (App. C, *infra*, p. 45a; PX 5, 78A), yet it found that the "clearest exercise" of sovereignty supporting Alaska's claim was the seizure of Japanese vessels in Shelikof Strait in 1962 (App. C, *infra*, p. 39a) and it also relied upon enforcement of Alaska's fishing regulations in 1970, while this case was pending (App. C, *infra*, p. 39a).

[11] The court relied upon the fact that in 1786 a Russian fur trader shot at an Englishman who was attempting to enter Cook Inlet (App. C, *infra*, pp. 25a-26a).

[12] This applies to the promulgation and enforcement of fisheries regulations by the Department of Commerce (App. C, *infra*, pp. 30a-31a), the order of the Secretary of Commerce to destroy certain maps prepared by the Tariff Commission showing penetration of the high seas into Cook Inlet (App. C, *infra*, p. 35a), and the preparation of special fisheries maps by the Department of the Interior showing the so-called Gharrett-Scudder baseline (App. C, *infra*, pp. 36a-37a).

in this area. See *United States* v. *California*, 332 U.S. 19, 39-40; cf. *United States* v. *California, supra*, 381 U.S. at 175, n. 49; *United States* v. *Louisiana, supra*, 394 U.S. at 30-32.

(f) The court relied upon actions taken by the State of Alaska with reference to waters outside of Cook Inlet,[13] although such actions would have been irrelevant in proving a claim by the United States against other nations to historic title to Cook Inlet. See *United States* v. *Louisiana, supra*, 394 U.S. at 77-78.

(g) The court relied upon events occurring after the United States had first disclaimed historic title to Cook Inlet as internal waters,[14] although this Court has stated that such a disclaimer can be overcome only by evidence making it clear beyond doubt that historic title had ripened *prior to* the disclaimer. *United States* v. *Louisiana, supra*, 394 U.S. at 77, n. 104. See generally pp. 18-21, *infra*.

(h) The court relied upon enforcement actions by the United States (and Alaska) which resulted in dismissals, rather than imposition of sanctions,[15]

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[13] The Shelikof Strait incident, strongly relied upon by the court (App. C, *infra*, pp. 39a-42a), involved seizure of Japanese vessels in Shelikof Strait, in the Uyak Section, Karluck District, Kodiak area (Exh. IJ), the nearest portion of which is about 75 miles from Cook Inlet (see App. J, *infra*).

[14] Thus, although the first disclaimer was made in 1962, and it was reiterated in 1969, the court relied upon Alaska's enforcement of its fishing regulations in 1970 (App. C, *infra*, p. 39a).

[15] This applies to the seizure of The Kodiak (App. C, *infra*, pp. 27a-28a) enforcement of United States fishing regulations

although this Court has specified that proceedings resulting in dismissals are of dubious value as assertions of sovereignty. *United States* v. *California, supra*, 381 U.S. at 174.[16]

2. In concluding that the facts established in the record constituted the requisite "acquiescence" by foreign nations in a claim of sovereignty by the United States (or Alaska) over Cook Inlet as inland waters, the decision of the courts below conflicts with this Court's decisions in *United States* v. *California, supra*, 381 U.S. at 172, and *United States* v. *Louisiana, supra*, 394 U.S. at 23.

Although some authorities hold that the mere absence of opposition by foreign states, as distinguished from their acquiescence, is sufficient to establish a claim to historic title, it is the position of the United States both in its foreign affairs and in this litigation that acquiescence of foreign nations in the exercise of sovereignty affecting them is required, and that it must be established by positive proof of approval of a claim of sovereignty before historic title can be established. In *United States* v. *Louisiana, supra*, 394 U.S. at 24, n.27, this Court took note of the

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against Americans (App. C, *infra*, pp. 31a-34a), with two exceptions, and enforcement of Alaskan fishing regulations against the Japanese in Shelikof Strait (App. C, *infra*, pp. 39a-42a) and against Americans in Cook Inlet (App. C, *infra*, p. 39a).

[16] Because of its reliance upon acts that were not legally relevant exercises of sovereignty, the court also erred in concluding as a matter of law that sovereignty had been exercised "continuously" for a sufficiently "considerable" period of time. See p. 9, *supra*.

split in viewpoints and unequivocally reiterated the position stated in *United States* v. *California*, *supra*, 381 U.S. at 172, that there must be "acquiescence." Although the district court purported to apply the test of acquiescence here, the facts relied upon (App. C, *infra*, pp. 43a-45a)—primarily the absence of substantial amounts of foreign fishing in Cook Inlet—constitute no more than absence of opposition. Because the United States has never by proclamation or legislation expressly claimed Cook Inlet as internal waters, there has been no occasion for foreign nations generally to signify their opposition, and their silence is thus immaterial.[17]

Moreover, the court's discussion of the "attitude of foreign nations" ignored the fact that, immediately following the seizures of the Japanese vessels in Shelikof Strait, the Japanese Government sent a diplomatic note of protest to the United States Department of State (App. C, *infra*, p. 41a), claiming the right to fish in Shelikof Strait and disassociating itself from a commitment made to Alaskan authorities by the private fishing company to abstain from fishing in the Strait or in Cook Inlet.

3. In 1962 the Legal Adviser of the Department of State specifically disclaimed historic title to Cook Inlet, stating that an extensive search of the records of that Department and of the Archives had revealed "no evidence that the United States has ever at any

[17] The court's reliance upon Canada's lack of opposition to the Gharrett-Scudder line (see p. 15, n. 12, *supra*) was legally erroneous because the map was accompanied by a disclaimer (PX 91), which made any protest unnecessary.

time claimed the waters of Cook Inlet as internal waters of the United States" (PX 58, p. 2). A subsequent letter from the Legal Adviser in 1969 reiterated the assertion that "[i]n its conduct of United States foreign relations the Department of State does not consider that Cook Inlet is a historic bay" (PX 69, p. 3).[18] The failure of the district court to give conclusive effect to the United States' disclaimer of sovereignty over lower Cook Inlet conflicts with the decisions of this Court in *United States* v. *California*, *supra*, and *United States* v. *Louisiana*, *supra*.

In *United States* v. *California* the position taken by the United States in the litigation was treated by this Court as a disclaimer of jurisdiction which should ordinarily be treated as "decisive," except perhaps in cases which "might arise in which the historic evidence was *clear beyond doubt*." 381 U.S. at 175 (emphasis supplied). In other words, a disclaimer is in large measure a foreign policy determination which should be treated as "conclusive" unless it would "prevent recognition of a historic title which may already have ripened because of past events * * *." *United States* v. *Louisiana*, *supra*, 394 U.S. at 77, n.104.

One of the reasons the district court refused to regard the United States' disclaimers as conclusive was

[18] The United States also disclaimed historic title to Cook Inlet in 1971, when the Department of State distributed to foreign nations an official baseline chart in which the disputed area is shown as being beyond the United States' coast line (PX 73; see App. C, *infra*, p. 46a).

that it concluded that the evidence was "clear beyond doubt" that "historic title had already ripened" (App. C, *infra*, pp. 45a, 53a). As we have shown, however, the court applied erroneous legal standards in assessing the historic evidence; properly viewed it was at best "questionable" [19] (*United States* v. *California*, *supra*, 381 U.S. at 175) and hence insufficient either to establish a prior ripening of historic title or to overcome the effect of the disclaimers.

The district court also based its disregard of the disclaimers upon its conclusion that they were "hastily prepared" and "based on questionable research" (App. C, *infra*, pp. 45a-47a). In thus going behind the face of the disclaimers, the court relied on grounds not approved by this Court as a basis for refusing to treat a disclaimer as conclusive.[20] Cf. *United States* v. *Morgan*, 313 U.S. 409, 422. Indeed, the disclaimers here reflect a foreign policy judgment normally beyond the scope of judicial review. See, *e.g.*, *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111-112; *United*

[19] Indeed, the court of appeals observed "that the evidence was in conflict and that the question of determining the ultimate inferences to be drawn was close" (App. A, *infra*, p. 5a).

[20] Here, as in *California*, there is no showing that the disclaimer represented an *ad hoc* divergence from the "firm and continuing international policy [of the United States]," motivated "solely to gain advantage" in the litigation. *United States* v. *Louisiana*, *supra*, 394 U.S. at 74, n. 97. Indeed, the record shows that the disclaimer here is entirely consistent with the position taken internationally by the United States in similar circumstances (see, *e.g.*, PX 69, 91, 93).

States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 330-331.[21]

4. The court of appeals erred in applying to the legal issues raised on appeal the test of whether the district court's determinations were "clearly erroneous" (App. A, *infra*, p. 5a). Nearly all of the questions raised on appeal involved, not the correctness of the district court's findings as to factual issues on which there was conflicting evidence, but rather the legal significance to be attached to undisputed facts. Such issues present questions of law, which the court of appeals should have decided. Indeed, when precisely analogous questions have been presented to this Court on review of the report of a special master, the Court has decided those legal questions itself, and has not merely accepted the master's resolution if it was not clearly erroneous. *E.g.*, *United States* v. *California*, *supra*, 381 U.S. at 174-175.

5. It is particularly important that this Court review a court of appeals decision, such as this one, which departs from this Court's prior decisions with respect to a matter having important foreign policy

[21] The courts are ordinarily bound by the determinations of the Executive as to the territorial extent of United States sovereignty. See *Jones* v. *United States*, 137 U.S. 202; *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380. The disclaimers here represent "the considered decision of the United States" as to the extent of its border, which it would be "inappropriate" for the courts to review or overturn. *United States* v. *Louisiana*, *supra*, 394 U.S. at 73. See also, *e.g.*, *Ex Parte Peru*, 318 U.S. 578, 588-589.

and international consequences. The practical effect of the decision below, in giving Alaska jurisdiction over all of Cook Inlet, would be comparable to an assertion by the United States to other nations that the United States now regards all of Cook Inlet as internal waters. See *United States* v. *California*, *supra*, 381 U.S. at 168. However, as stated in a letter of the Legal Adviser of the Department of State recommending that certiorari be sought in this case, that Department, after reviewing the findings of fact in this case, is of the opinion "that there is no evidence of any act which could establish a claim [to Cook Inlet as historic internal waters] based on the applicable international criteria" (App. G, *infra*, p. 69a). Moreover, the Department is "loath to make [such] an international assertion," thereby changing the position maintained by the United States internationally, because "[t]o do so could have serious adverse implications for our foreign relations" (*ibid.*) by making it more difficult to resist claims of other nations to extensions of their sovereignty and by impairing our existing rights to navigation and overflight (*id.* at 70a).

Affidavits submitted to the court of appeals in support of the government's motion to recall and stay the mandate (Apps. H, I, *infra*) provide striking examples of the serious threat that the court of appeals' decision has already posed for the foreign relations of the United States. Thus, if allowed to stand, the decision that Cook Inlet is inland waters could result in the nonrenewal of existing bilateral

fisheries agreements, create conflict between Canada and the United States with respect to Canada's assertion of fisheries jurisdiction, and, in all likelihood, seriously impair essential cooperation between the United States, Canada, and possibly other nations in ongoing law of the sea negotiations (*ibid.*).[22]

The decision below also has domestic consequences of great magnitude. It has been estimated that Cook Inlet will yield 1.6 billion barrels of oil and 11.7 trillion cubic feet of natural gas. The Department of the Interior estimates that the bonuses and royalties generated from such production will exceed one billion dollars. The decision below vests in Alaska the rights to all such resources under Cook Inlet, and deprives the United States of any interest in any portion of those resources. However, if the United States has jurisdiction over them Cook Inlet is not inland waters. See 43 U.S.C. 1302, 1331, *et seq.*

Finally, the types of conduct that occurred in Cook Inlet may also have occurred in other overlarge bays and baylike areas in Alaska and along the coasts of the United States.[23] Unless the conflict and un-

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[22] The United States has been able temporarily to prevent irreparable harm to these foreign relations interests by obtaining a recall and stay of the mandate of the court of appeals (App. E, *infra*).

[23] In hearings before the Senate Commerce Committee, the attorney who conducted the Cook Inlet trial for Alaska contended that the Alexander Archipelago was inland waters. His case was based on testimony of many of the same witnesses who testified at the Cook Inlet trial and upon the same type of conduct that the district court found sufficient to estab-

certainty created by the decision below as to the kinds of conduct that constitute sovereignty and acquiescence are resolved by this Court, Alaska and other littoral states may be encouraged to litigate similar historic claims in efforts to extend the United States' jurisdiction over coastal waters and thus to increase the states' Submerged Lands Act grants.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

GERALD P. NORTON,
Assistant to the Solicitor General.

BRUCE C. RASHKOW,
EDWARD F. BRADLEY,
Attorneys.

JUNE 1974.

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lish Cook Inlet as historic inland waters. Hearings Before the Senate Commerce Committee on Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, 92d Cong., 2d Sess., Ser. No. 92-69, pp. 18, *et seq.*

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2400

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

STATE OF ALASKA, DEFENDANT-APPELLEE

[March 19, 1974]

Appeal from the United States District Court for the District of Alaska

OPINION

Before: KOELSCH, CARTER and WALLACE, Circuit Judges

PER CURIAM:

The United States sued the State of Alaska to quiet title to the lower part of Cook Inlet located on the Alaska coast and to enjoin Alaska from offering oil and gas leases for sale in the area. The district court found in favor of Alaska. *United States* v. *Alaska*, 352 F.Supp. 815 (D. Alaska 1972). The United States appealed and we affirm.

In early 1967, Alaska offered to sell, at competitive bidding, an oil and gas lease to a tract of 2,500 acres of submerged lands located in lower Cook Inlet. The United States does not contest Alaska's right to the upper part of Cook Inlet. The tract in ques-

tion, however, is located more than 3 geographic miles seaward of the low-water line, the closing lines of rivers and small bays within Cook Inlet and the 24-mile fallback line drawn across the narrows at Kalgin Island. The essence of the controversy involves the proper location of the Alaska coastline. The United States would place the coastline at the 24-mile fallback line at Kalgin Island. Alaska would place it at the 47-mile opening of Cook Inlet extending from Cape Douglas through the Barren Islands to Point Gore. The significance of the placement of this line is that under the Submerged Lands Act of 1953 (43 U.S.C. §§ 1301-43), a state is entitled to the natural resources of the seabed and subsoil in waters up to 3 geographic miles seaward from the state's coast line at low tide or its functional equivalent as drawn by connecting the land openings of water inlets such as rivers and small bays. The waters landward from the line forming the functional equivalent of the coast line are inland waters belonging to the state and the 3-mile distance extends seaward from that line. Whether this line should be drawn at Kalgin Island (as the United States contends) or at Cape Douglas-Point Gore (as Alaska contends) will determine whether the area in question may be leased by Alaska. The pivotal question in this determination is whether this is a seabed over which there are "inland waters" as denominated in, but not defined by, the Submerged Lands Act. If so, Alaska is correct and the district court's judgment must be affirmed.

The Supreme Court has adopted the definition of inland waters as contained in the Convention on the Territorial Sea and the Contiguous Zone (T.I.A.S. No. 5639). *United States* v. *California*, 381 U.S. 139, 165 (1965). Article 7 describes inland bays; but Cook Inlet fails to meet the definition which requires a distance of no more than 24 miles between the natural entrance points of the bay. Cook Inlet is 47 miles wide at its natural entrance points. Nevertheless, the Court has recognized that whether or not a body of water is inland may depend upon historical as well as geographical factors. The Court has stated:

> Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland. But it has also been recognized that other areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation.

United States v. *Louisiana* (*Louisiana Boundary Case*), 394 U.S. 11, 23 (1969). Historic bays, which Article 7 exempts from the requirement of being no more than 24 miles between the natural entrance points, fall within this classification. As to such waters the Court in the *Louisiana Boundary Case* continued: "[I]t is generally agreed that historic title can be claimed only when the 'coastal nation has traditionally asserted and maintained dominion

with the acquiescence of foreign nations.'" 394 U.S. at 23, *quoting from United States* v. *California*, 381 U.S. 139, 172 (1965). As further guidance the Court noted with apparent approval:

> A recent United Nations study recommended by the International Law Commission reached the following conclusions:
>
> "There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient." Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y. B. Int'l L. Comm'n 1, 13, U. N. Doc. A/CN.4/143 (1962).

394 U.S. at 23-24 n.27. The district court correctly adopted and applied this three-pronged test. Having correctly applied the law, our sole remaining task is

to determine whether the facts found by the trial court were clearly erroneously. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The United States mounts a heavy attack, reviewing in detail evidence which it contends leads unquestionably to the conclusion that the waters involved are at the most territorial rather than inland. It has succeeded in demonstrating that the evidence was in conflict and that the question of determining the ultimate interferences to be drawn was close. But it failed to show the findings to be clearly erroneous. The trial judge received the testimony of hundreds of witnesses and examined volumes of documents. The clearly erroneous test applies to both. *W. S. Shamban and Co.* v. *Commerce and Industry Ins. Co.*, 475 F.2d 34 (9th Cir. 1973); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 548-49 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *Lundgren* v. *Freeman*, 307 F.2d 104, 114-15 (9th Cir. 1962).

As the Court in the *Louisiana Boundary Case* has instructed, boundary disputes involving such complex and detailed evidence as has been presented in this case must be resolved by answering questions that are primarily factual. This task can best be done by the trier of fact who has heard the evidence in the first instance. The Court stated:

> Historic bays are not defined in the Convention, and the term therefore derives its content from general principles of international law. As the absence of a definition indicates, there is no universal accord on the exact meaning of his-

toric waters. There is substantial agreement, however, on the outlines of the doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters. But because the concept of historic waters is still relatively imprecise and *its application to particular areas raises primarily factual questions*, we leave to the Special Master —as we did in *United States* v. *California*—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays.

394 U.S. at 75 (emphasis added and footnotes omitted).

As the law applied by the district court was correct and its findings were not clearly erroneous, we affirm.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A-45-67

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA, DEFENDANT

MEMORANDUM AND ORDER

The above cause, long standing in this district, was tried to the Court in January, 1972. The issues presented for the Court's determination are exceptionally complex. Literally hundreds of exhibits were received into evidence, which, together with the testimony of numerous witnesses and the voluminous trial and post trial briefs of the parties, have required the extensive attention of the Court. The cause has been under advisement since the end of July of 1972, when the final post trial brief was filed.

While the Court has spent considerable time with all aspects of the evidence as it relates to the legal issues, a discussion of only the major contentions is included here.

Both parties have submitted, pursuant to the Court's request, their proposed findings of fact, conclusions of law and judgment form. These, too, have been carefully considered by the Court.

In April of 1967 the State of Alaska offered in a competitive oil and gas lease sale a tract of submerged land located beneath lower Cook Inlet. A month later the United States disputed the ownership of the resources lying beneath lower Cook Inlet by commencing this action to quiet title.

The apportionment of subsurface resources between a littoral state and the United States has long been the subject of intensive litigation. In *United States* v. *California*, 332 U.S. 19 (1947) the Supreme Court held that rights to subsurface resources lying beneath the three mile territorial sea are vested exclusively in the United States. In response to that ruling, Congress enacted the Submerged Lands Act of 1953. 43 U.S.C. 1301. That act not only granted to a coastal state exclusive rights to subsurface resources located beneath the territorial sea, but it granted identical rights to subsurface resources located beneath inland waters. Unfortunately, Congress did not define "inland waters" as that term appeared in the Submerged Lands Act. It was not until *United States* v. *California*, 381 U.S. 139, at 164 (1965) that the term "inland waters" of the Submerged Lands Act was subject to judicial interpretation. In that case, the Court adopted the definitions of inland waters set forth in terms of international law in the Convention of the Territorial Seas and the Contiguous Zone (T.I.A.S. No. 5639).

The Convention established rules of international law for determining the location of the baseline from

which the territorial sea of a nation is measured. Waters located landward of such a baseline are to be considered inland waters of the coastal nation. Pursuant to the Submerged Lands Act, the resources underlying the waters located landward of such a baseline would be vested exclusively in the coastal state. The rule concerning inland bays is found in Article 7 of the Convention. Essentially the Convention sets forth a twofold requirement for a finding that a bay is a part of the inland waters of a littoral nation: (1) the indentation shall be of such curvature that its area is larger than the area of a semicircle whose diameter is a line drawn across the mouth of the indentation, and (2) the distance between headlands of the bay shall not exceed 24 miles. It is apparent that the latter requirement is not satisfied as to lower Cook Inlet. However, paragraph 6 of Article 7 of the Convention states that "the foregoing provisions shall not apply to so-called 'historic' bays."

It is that historic bay exception of the Convention which is the focus of the complex controversy presently before the court. If lower Cook Inlet is a historic bay within the meaning of the Convention, that body of water is thus inland water within the meaning of the Submerged Lands Act, with the result that the State of Alaska would have exclusive rights to the subsurface resources.

Since the Convention does not define the term "historic bays", resort must be made to general principles of international law. In *United States* v.

Louisiana, 394 U.S. 11, at 23 (1969), the Court footnoted with apparent approval a test for determining the existence of historic waters. The requirements were set forth in a United Nations study recommended by the International Law Commission:

> There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign states. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient. Juridical Regime of Historic Waters, Including Historic Bays, 2 Y.B. Int'l L. Comm'n 1, 13, U. N. Doc. A/CN.4/143 (1962) [hereinafter cited as Juridical Regime]

At this juncture it should be noted that the Supreme Court has imposed certain modifications to the application of general principles of international law used in the determination of historic waters.

The first modification pertains to the vantage point

to be assumed by a court in judging the facts concerning the status of a bay as historic waters. In *United States* v. *Louisiana*, 394 U.S., at 77, the Court indicated that such a controversy should be viewed as if the claim were being made by the United States and opposed by another nation.

The second modification concerns the degree to which a coastal state may rely on its own assertions of sovereignty over disputed waters to establish historic title. In *United States* v. *Louisiana*, *Id.* the Court made clear that state exercises of dominion, as distinguished from federal assertions of sovereignty, may properly be considered on the issue of historic title.

The third modification pertains to the legal effect of a disclaimer by the United States that disputed waters are historic waters. In *United States* v. *California*, 381 U.S., at 175, the Court ruled that a disclaimer by the United States was decisive in view of the "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters." But the Court also stated at that point:

> We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. *Id.*

In *United States* v. *Louisiana*, 394 U.S., at 77, the Court elaborated on its position by stating:

> (I)t would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National

> Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect of past events.

In a footnote to that excerpt, the Court further limited the legal effect of a disclaimer:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States* v. *California*. *Id.*

The disclaimers in the instant case approach the impermissible contraction of authority cautioned against by the Supreme Court, especially in view of the clear evidence of continuous assertions of sovereignty over lower Cook Inlet. Considering the circumstances under which they were prepared, the court assigns a low reliability factor to the disclaimers. The first disclaimer was a letter from the Legal Advisor to the Secretary of State. The court finds the evidence to show the disclaimer to have been hastily prepared and based on questionable research. The second disclaimer was also a letter from the State Department. That disclaimer was prepared

two years after the commencement of this action, and was vulnerable to self-serving interests.

The final qualification concerns the quantum of proof required for a showing of historic title. The expression "clear beyond doubt", as it first appeared in *United States* v. *California*, 381 U.S., at 175, could very well not have been intended by the Supreme Court to establish such a high standard of proof in all cases. The context in which that phrase appeared pertained to the legal effect of a disclaimer by the United States in the face of questionable evidence of historic title. The context of this case is clearly distinguishable. Further, there is other language in that case which implies that no rigorous standard of proof is required to prove historic title. 381 U.S., at 174. Nor do the long respected commentators of international law appear to require a rigorous standard of proof. Juridical Regime 158. Despite this uncertainty over the burden of proof, this court will adhere to the higher standard of proof, for the reason the Court finds the State of Alaska has satisfied the requirements for establishment of historic title even under the more rigorous standard.

The first requirement for establishing historic title to disputed waters is the effective exercise of authority over the area by the nation claiming the historic right. Juridical Regime 80. The authority which a nation must exercise over a maritime area in order to be able to claim it as historic waters is sovereignty. *Id.* 85. It is not necessary that a

nation exercise all rights and duties which are included in the concept of sovereignty. *Id.* 88. Among the acts by which sovereignty is exercised are those which deny to foreign fishing vessels the right to fish in the disputed waters:

> What acts under municipal law can be cited as expressing its desire to act as a sovereign? . . . There are some acts which are manifestly not open to any misunderstanding in this regard. The State which forbids foreign ships to penetrate the bay or to fish therein indisputably demonstrates by such action its desire to act as the sovereign. *Id.* 90.

The commentators of international law appear to be in full agreement that the sovereignty must be effectively exercised. That is, the intent of the nation making the claim to historic title must be expressed by deeds and not merely by proclamations. *Id.* 98. However, it is not necessary for the nation making the historic claim to undertake particular acts of enforcement if the laws and regulations were respected by foreign nations. *Id.* 99. It is only required that if an act of enforcement was necessary to maintain sovereignty, that such action was taken. *Id.*

The State of Alaska has produced evidence which establishes clear beyond doubt that there has been such sufficient exercise of authority over lower Cook Inlet.

The earliest clear assertion of sovereignty over the disputed waters occurred in 1906 when Congress

enacted the Alien Fishing Act. Act of June 14, 1906, ch. 3299, 34 Stat. 263. That Act prohibited fishing by aliens in the waters of Alaska under the jurisdiction of the United States, and permitted search and seizure of foreign vessels engaging in the proscribed activity. Testimony of witnesses who enforced that Act in Cook Inlet established that all of Cook Inlet landward of a line extending from Cape Douglas to Point Gore, including the Barren Islands, was treated as part of the waters of Alaska. The witnesses testified further that they did not recall ever seeing any foreign fishing vessels in lower Cook Inlet, and if they had, they would have taken affirmative action.

Another assertion of sovereignty occurred on November 3, 1922, when President Harding created the Southwestern Alaska Fisheries Reservation by Executive Order. The administrative regulations promulgated pursuant to the executive order described Cook Inlet as that area "north of the latitude of Cape Douglas . . . including the Barren Islands . . . and all the shores and waters of Cook Inlet." Dept. of Commerce Cir. No. 251, p. 8, 9th ed. (Jan. 9, 1923). The evidence was clear that lower Cook Inlet was patrolled, and that several acts of enforcement occurred involving American fishing vessels.

The effort which began in 1922 culminated in 1924, when Congress enacted the White Act. Act of June 6, 1924, ch. 272, 43 Stat. 464. That Act delegated to the Secretary of the Interior the authority to prescribe a wide scope of fishery regulations for the

waters of Alaska. The White Act did not substantially change the description of Cook Inlet, Cook Inlet was still defined as the area located landward of the Cape Douglas-Point Gore line, including the Barren Islands. Dept. of Commerce, Laws and Regulations for Protection of Fisheries of Alaska, p. 19 (Dec. 2, 1924). As was the case under the Alien Fishing Act, the testimony of witnesses who enforced the White Act indicated that lower Cook Inlet was regularly patrolled, and that numerous acts of enforcement of fishing regulations occurred in the same area over the years.

As a consequence of the enactment of the Alaska Statehood Act, both the Alien Fishing Act and the White Act were superseded. The result was that on January 1, 1960, the State of Alaska assumed control of the fisheries formerly within the jurisdiction of the federal Acts. The evidence indicates that the description of Cook Inlet under the Alaska Commercial Fishing Regulations since statehood has not substantially changed from the definition under the federal Act. Under the Alaska regulations, Cook Inlet is comprised of the waters located inland from the line drawn from Cape Douglas to Point Gore, including the Barren Islands. 5 AAC 109.02 (1959).

The clearest exercise of sovereignty occurred in the Shelikof Strait in 1962. The Japanese fishing vessel *Banshu Maru* and others had apparently intruded into the southernmost portion of lower Cook Inlet near the Barren Islands for a few hours and then proceeded into the Shelikof Strait. On a prior

occasion an official of the State Department indicated to the Governor of Alaska the federal government's unwillingness to act, but encouraged action by the State of Alaska. Consequently the State of Alaska effected the seizure and arrest of the *Banshu Maru* in Shelikof Strait. Although the evidence is conflicting, there is no clear evidence that the correctness of the act was officially denied or admitted by the United States.

The second requirement for establishing historic title to disputed waters is the continuity of the exercise of authority over a period of time sufficient to create a usage. Juridical Regime 101. No precise length of time is necessary to create a usage on which historic title is based. *Id.* 104. Since there are no precise time-limit criteria, the lapse of time necessary to permit emergence of historic title is a matter of sound judgment. *Id.* 123, 131.

The evidence produced by the State of Alaska proves clear beyond doubt that the exercise of authority over lower Cook Inlet has existed without interruption from 1906, and very possibly earlier, until the time this dispute arose. The legislative enactments have been applied consistently and without interruption for a sufficient time to give rise to a usage over the disputed waters.

The final requirement for establishing historic title is the attitude of foreign nations. The commentators of international law do not agree on the precise attitude required. Most appear to require that the exercise of authority by the coastal nation be con-

ducted under the general toleration of the community of nations, although others indicate that acquiescence is the required attitude. Juridical Regime 132. The Supreme Court has used language which indicates that acquiescence is the required standard, *United States* v. *California*, 381 U.S., at 172, but there is no clearly binding authority on the point. Since under the facts of this case the requirement has been satisfied even under the higher standard of acquiescence, the distinction between toleration and acquiescence becomes a matter of academic significance.

Under the particular facts and evidence of this case, the court finds it to be clear beyond doubt that the community of nations has acquiesced in the emergence of historic title of lower Cook Inlet. The testimony of witnesses who have been charged with enforcement of the fishery regulations over lower Cook Inlet has clearly indicated the general absence of foreign fishing vessels over the years. It should be noted that after the *Banshu Maru* incident, the Japanese and the State of Alaska agreed that in the future there would be no attempt by the Japanese to fish the waters in question. To date the agreement has been carefully respected by the Japanese. Although, since the *Banshu Maru* incident, there have been intrusions into other Alaskan waters by Japanese, Soviet, Korean and Canadian vessels, there have been no such documented intrusions into lower Cook Inlet.

Conflicting evidence exists as to a few isolated instances of earlier intrusions into Cook Inlet by Canadian halibut fishing vessels. Considering the entire record, it is probable that historic title to the disputed waters ripened before the date of those Canadian intrusions. Consequently, the presence of those vessels is neither relevant nor controlling on the issue of creation of historic title. Even if historic title had not ripened before the Canadian intrusions, it is not likely those intrusions would have interfered with the emergence of historic title for the reason that American authorities consented to their presence. Had the Canadians been present in greater numbers on more frequent occasions, or had they been fishing for salmon instead of halibut, it is probable that American fishing regulations would have been enforced against them. Further, the evidence indicates a spirit of comity existing in the form of customary reciprocal fishing rights between American and Canadian halibut fishermen which remained unwritten until 1970. Canada-U.S.A. Reciprocal Fishing Agreement, April 24, 1970.

In summary, the evidence indicates clear beyond doubt that foreign maritime nations having a possible interest in lower Cook Inlet have respected American dominion over those waters.

The requirements for the emergence of historic title have been satisfied under the general principles of international law. All of Cook Inlet located north of the Cape Douglas-Point Gore line, including the Barren Islands, are inland waters of the State of Alaska. Accordingly, under the provisions of the Submerged Lands Act of 1953, the subsurface resources of lower Cook Inlet are vested exclusively in the State of Alaska.

The United States has advanced the argument that a decision by this court upholding historic title substantially would interfere with the conduct of foreign relations by the Executive branch of government. Under the facts and circumstances of this case, the court sees no merit in that contention. The United States has never considered lower Cook Inlet to be a part of the high seas. As the evidence clearly establishes, the United States has long considered all of Cook Inlet to be historic inland waters.

Therefore,

IT IS ORDERED:

1. THAT the complaint of the United States to quiet title to the designated areas of lower Cook Inlet is dismissed.

2. THAT judgment may be entered in favor of the State of Alaska.

3. THAT counsel for the State of Alaska review proposed findings of fact and conclusions of law and judgment in the light of this memorandum and present appropriate findings, conclusions, and judgment to the Court.

DATED at Anchorage, Alaska, this 14th day of December, 1972.

/s/ James A. von der Heydt
United States District Judge

cc: G. Kent Edwards, United States Attorney
Edward F. Bradley, Jr., Department of Justice
John E. Havelock, Attorney General

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil No. A-45-67

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA, DEFENDANT

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

I. INTRODUCTORY

1. In legal notices dated February 27 and March 6 and 13, 1967 the State of Alaska offered for sale at competitive bidding oil and gas lease as to Tract C 19-1, described in such notice as T.2S., R.16W., S.M., Sections 15, 16, 21 and 22, all more than three miles from shore within the disputed area of Cook Inlet.

2. On March 20, 1967, the United States filed the Complaint herein to quiet title and for injunctive relief to prevent the State of Alaska from leasing or offering to lease the mineral reserves within the disputed area.

3. The area in dispute in this case is the area encompassed by the lines "T" and "SL", said lines offered as Exhibits A and B respectively to the pretrial order herein.

II. GEOGRAPHIC AND ECONOMIC CHARACTERISTICS OF COOK INLET

4. The geographic and economic characteristics of Cook Inlet are such that it would have been unnatural had not the inhabitants of its shores exercised continuous sovereignty over its shores and waters from the earliest times forward, with the acquiescence of foreign nations.

5. Cook Inlet is a clearly defined, well marked indentation whose penetration is in such proportion to the width of its mouth, so that, together with the location of Kodiak Island off its natural entrance, it contains land-locked waters. (Exhibit B; Hodgson's depos. pp. 41-43)

6. The area of Cook Inlet is larger than that of the semi-circle whose diameter is drawn across the mouth of Cook Inlet. (Exhibit B)

7. The line extending between the natural entrance points of Cook Inlet is approximately forty-seven miles long.

8. The waters of Cook Inlet are completely surrounded by the lands of Alaska so that in a geographic sense Cook Inlet resembles a large inland lake. (Exhibit B)*

9. All Cook Inlet's streams and tributaries, numbering more than 131, are entirely situated upon the lands of Alaska. (Exhibit B, IW, and Stewart's testimony, Tr. p. 574).

10. Cook Inlet is not and has never been a waterway for intercourse between nations. (Exhibits B through I, K)

11. Cook Inlet is necessarily inland, well marked by prominent headlands inside of which the mariner instinctively feels himself within the jurisdiction and

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* Although of questionable legal significance, it is an interesting historic fact that the earliest explorers, who first saw Cook Inlet and its natural terrain, labeled the waters "Cook River." (Exhibit A, and Dr. William Hunt's testimony, Tr. p. 502).

domain of Alaska. (See Exhibit B, Dr. M. Strohl's testimony, Tr. pp. 457-474, and 464-465)

12. From the beginning of recorded history Cook Inlet has been vital to the economic interest of those persons inhabiting its shores; first the carrying on of the fur trade; from the late 1800's to the present, extensive fishing; and more recently, activity relating to both hard minerals and oil. (See Dr. George Rogers' testimony, Tr. pp. 596-636, and Robert DeArmond's testimony, Tr. pp. 520-570; Dr. William Hunt's testimony, Tr. pp. 474-518; Exhibits GI-HH, IY, IZ, JA, IW)

13. All of Cook Inlet's waters have been and are such that they have been easily patrolled and protected by the government entity which has controlled its shores. (See Findings 19 through 85 below)

14. If the United States and the State of Alaska had not controlled the fishing carried on within the disputed area of Cook Inlet, as hereinafter found, there would have been a disastrous effect upon the fish resources in Cook Inlet which had theretofore been exploited by the citizens of the United States and residents of Alaska. The landing law could not and would not have prevented the disaster. (Don Stewart's testimony, Tr. pp. 577-588)

15. Conversely, the existence and enforcement of such fishing laws were not intended for the benefit of persons living elsewhere, as in Canada, Russia, or Japan. (Rogers' testimony, Tr. pp. 596-636; Stewart's testimony, Tr. pp. 571-596; Ex. AF-1906 Alien Fishing Act; White Act 43 Stat. 464)

III. Exercise of Sovereignty

16. The State of Alaska has produced evidence, hereinafter referred to in subsequent Findings, which establishes clear beyond doubt that there has been an exercise of sovereignty over Cook Inlet by governments whose nationals have inhabited its shores sufficient to justify the status of the disputed area of Cook Inlet as an historic inland water bay of the United States and now of Alaska.

A. *Russian Sovereignty*

17. Russia exercised sovereignty over the disputed area of Cook Inlet and, although the exercise of such sovereignty in the early days of Alaska's history was not as extensive as that subsequently exercised by the United States and State of Alaska, it was, nevertheless, consistent therewith.

18. From an historic standpoint, all of Cook Inlet fell under exclusive Russian dominion by the early 1800's. (Exhibit X, pp. 243-244; Exhibits W and Y, DeArmond testimony, *infra*, Finding 19; Dr. Hunt's testimony, Tr. pp. 497-502; Exhibits GU, GV)

19. At least four Russian settlements existed on the shores of Cook Inlet by the early 1800's. (DeArmond's testimony, Tr. pp. 528-531; 535-542; Exhibits HV, GU, GV)

20. In about the year 1786, an attempt to enter Cook Inlet by the Englishman, Portlock, drew a volley of cannon fire from a Russian fur trader in the vicinity of Port Graham—a traditional and recog-

nized show of authority. (Hunt's testimony, Tr. pp. 492 and DeArmond's testimony, Tr. p. 569)

21. The Bering Sea Fur Seal Arbitration did not adjudicate the status of Cook Inlet. In fact the United States lost the arbitration principally because it could not prove that Russia exercised sovereignty over the Bering Sea. (Exhibits AB-1, p. 36; AB-2; AB-3, p. 79)

B. *United States Sovereignty*

22. The rights of Russia as to jurisdiction and sovereignty in Cook Inlet passed unimpaired to the United States at the time of the Treaty of Cession, 1867. (Fur Seal Arbitration, AB-3, p. 79)

23. Thereafter the United States began and continued the exercise of sovereignty over all of Cook Inlet. (*Infra.*, Findings 22 through 63)

24. The vessel, KODIAK, was arrested in 1892 because of an alleged violation of R.S. 1956 by the United States Revenue cutter MOHICAN more than twenty miles from shore in the disputed area of Cook Inlet slightly north of a line extending between Cape Douglas and Point Bede. (*The KODIAK*, 53 Fed. 126 (1892); Exhibit AE; DeArmond's testimony Tr. pp. 544-545)

25. At the same time of the arrest of the KODIAK, the vessels LETTIE and JENNIE were arrested more than three miles from shore in Cook Inlet by the United States Revenue cutter MOHICAN for the same reason as in the case of the KODIAK. (DeArmond's testimony, Tr. pp. 544-546; Exhibit HV)

26. The United States District Court for the District of Alaska in *The KODIAK*, 53 Fed. 126 (1892), concluded that the seizure of the KODIAK was made on the assertion on the part of the United States of territorial jurisdiction over the waters of Cook Inlet. (*Supra*, Finding 24)

27. The arrest of the KODIAK, LETTIE and JENNIE was the subject of newspaper publicity extending from June, 1892 through December, 1892; and the opinion of the court in that case was sent to and received by the Attorney General of the United States, who took no overt action of disapproval. (Exhibits AE, BV)

28. The vessels, OLGA and MARY ANDERSON were boarded in the disputed area of Cook Inlet, twelve miles off Port Graham, in 1893 by a United States patrol boat because of a suspected violation of R.S. 1956. (DeArmond's testimony, Tr. pp. 546-547; Exhibit HV)

29. R.S. 1956 was interpreted to require the seizure of foreign vessels hunting sea otter within the three mile limit. Since seizures occurred more than three miles from the shoreline of Cook Inlet, the necessary inference is and was that the baseline from which to measure the three miles was not interpreted as the shoreline of Cook Inlet.

30. The arrests and seizures of the vessels KODIAK, LETTIE and JENNIE, by enforcement officials of the United States government and the subsequent ruling of the United States District Court in 1892 and the subsequent boardings of the vessels

OLGA and MARY ANDERSON by enforcement officials in 1893 were assertions of sovereignty by the United States over the disputed waters of Cook Inlet.

31. If the foregoing are not assertions of sovereignty, then the earliest clear assertion of sovereignty by the United States over the disputed waters of Cook Inlet occurred in 1906 when the Congress of the United States passed an Act Prohibiting Fishing by Aliens in the waters of Alaska under the jurisdiction of the United States.

32. For purposes of enforcing such Act, all waters of Cook Inlet were "waters of Alaska under the jurisdiction of the United States," to-wit: waters inside a line extending from Point Gore through the Barren Islands to Cape Douglas (inland waters) and all waters extending three miles seaward of that line (territorial sea). (Exhibits AF, BX, BY; *KODIAK* case, *supra*; Exhibits CH, CI, BZ, FO; Studdert's depos., pp. 11-13 and 23-24; Skerry's depo., p. 29; Headlee's testimony, Tr. pp. 319-320; Tr. p. 340; Erickson's depos. pp. 11-13; Robert's testimony, Tr. pp. 300-322.

33. The effect of such Act was to exclude aliens from fishing within the above-described inland waters and territorial sea of Cook Inlet and to permit the search and seizure of foreign vessels engaging in the proscribed activity. (*Supra*, Finding 32)

34. The United States Revenue Cutter Service as early as 1906 had the duty to enforce the Alien Fishing Act.

35. In 1922, by Executive Order, President Harding created the Southwestern Alaska Fisheries Reservation. Regulations promulgated pursuant to the Executive Order described Cook Inlet as that area "north of the latitude of Cape Douglas . . . including the Barren Islands . . . and all the shores and waters of Cook Inlet." All of that area was included within the Southwestern Alaska Fisheries Reservation. (Exhibits AJ and 22)

36. The following admonition of the President of the United States was applicable within the Southwestern Alaska Fisheries Reservation:

> "Warning is hereby expressly given to all unauthorized not to fish in or use any of the waters herein described or mentioned."

(Exhibit AJ)

37. Under the Southwestern Alaska Fisheries Reservation, permits from the United States government (Bureau of Fisheries) were required if fishing activity was carried on upon waters landward of the baseline from which the territorial sea was measured (or stated in another way, within the three mile limit). (Exhibit CG, p. 7 and Exhibit DO)

38. The agent of the United States Bureau of Fisheries regularly patrolled the disputed area of Cook Inlet for the purpose of enforcing the regulations and permit requirements of the Southwestern Alaska Fisheries Reservation. (Studdert's depos., p. 19)

39. On May 27, 1924, W. P. Studdert, Agent in Charge of the United States Bureau of Fisheries Op-

erations in the Cook Inlet District of the Southwestern Alaska Fisheries Reservation boarded two American halibut schooners, the NEW ENGLAND and the ZAPORA for fishing halibut in Cook Inlet without the required permits. The boardings by Mr. Studdert took place more than three miles from shore, in the disputed area of Cook Inlet, along a line extending generally from Snug Harbor to Seldovia. (Exhibits BE, BF, DJ, B; Studdert's depos. pp. 10-20, Tr. pp. 551, 554; and Exhibit HV)

40. In 1924 the Congress of the United States passed the "Act for Protection of the Fisheries of Alaska and for Other Purposes" (the White Act). (43 Stat. 464)

41. The White Act granted the Secretary of Commerce and later the Secretary of the Interior the power to "set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction." (43 Stat. 464)

42. Pursuant to his authority granted under the Act, the Secretary of Commerce and later the Secretary of the Interior from 1924 through 1959 included as waters of Alaska over which the United States has jurisdiction, all of the waters of Cook Inlet inside a line extending from Point Gore through the Barren Islands to Cape Douglas. (Laws and Regulations for the Protection of Fisheries of Alaska, Department of Commerce, Dec. 2, 1924; Exhibit IU)

43. For purposes of fishery management under the White Act the three mile limit in Cook Inlet was measured from a line connecting Cape Douglas, the

Barren Islands and Point Gore. (Exhibits IU, FO; Day's depos. pp. 4-13; Skerry's depos. p. 24, line 13; record as a whole)

44. The Cook Inlet area as it was defined in regulations promulgated under the White Act from 1924 through 1956 was not, as in the case of all other regulatory areas defined pursuant to the White Act, limited to territorial coastal and tributary waters of Alaska. (Exhibits IU and CR)

45. Unlike the Florida statute which was the subject of *Skiriotes* v. *Florida*, 313 U.S. 69 (1941), the regulatory provisions of the White Act (Respecting seasons, area closures, type of gear and limits) were interpreted by those charged with their enforcement as being applicable to all such fishing activities—whether carried on by United States nationals or foreigners—upon the inland waters and territorial sea of the United States. Whereas the Florida statute, the subject of the *Skiriotes* case, expressly referred to the Gulf of Mexico, an area of international waters over which jurisdiction could properly be claimed against citizens of Florida only, the White Act dealt with the waters of Alaska, over which the United States had jurisdiction which could be and was asserted against all persons, citizen and alien alike. Those regulatory provisions of the White Act, unlike the aforementioned Florida statute, were not construed as an exercise of authority over the United States nationals fishing upon international waters. (Exhibits BD, CR, EM, EK, EL, EI and AZ, p. 81)

46. Agents and officials of the United States Bu-

reau of Fisheries, Fish and Wildlife Service and Bureau of Commercial Fisheries regularly and consistently patrolled all of the Cook Inlet area as defined in the White Act regulations. Such patrols were carried out continuously from at least 1941 through 1959. The purpose of such patrols was to enforce all the fishery laws and regulations of the United States including the Alien Fishing Act within the inland waters and territorial sea of Cook Inlet, as described in Finding #3. Such patrols were carried out by vessel and aircraft and resulted in boardings with no concern as to the distance from the shore of Cook Inlet and in the disputed area. (Erickson's depos. pp. 3-7; Exhibit FN; Headlee's testimony, Tr. pp. 336-339; Smith depos. pp. 2; 4-9; 23-31; and 36; Costello's depos. pp. 4-8; 12; 15-23; Naab's depos. (No. 1) pp. 3; 25-26; 39-41; Shea's depos., pp. 3-10; 12-16; Exhibit IR and Wardleigh's depos., pp. 4, 10-12; Exhibit FK; Wilson's depos., pp. 3-13; Skerry's depos., pp. 3-6, 12-13, 16-21; Robert's testimony, pp. 302-310; 312-318)

47. The continuous patrolling of Cook Inlet and enforcement by agents of the United States of Acts and regulations throughout all of Cook Inlet was open, apparent, and visible to all—United States nationals and foreigners alike—who may have taken occasion to examine the conditions existing in Cook Inlet. These were deeds—and not merely proclamations—by which the intent of the United States to exercise sovereignty was clearly expressed.

48. The fact that no foreigners—except for a few

isolated Canadian halibut fishermen, referred to below —fished or attempted to fish in Cook Inlet, is clear evidence that the regulatory provisions were respected by foreign nations, so that there was no necessity for an act of enforcement by the United States government against them.

49. Claude William Shea in July, 1953 seized the vessel and gear of a United States fishing vessel acting contrary to the fishery laws and regulations (White Act) of the United States as to type of gear at a point in Cook Inlet more than three miles from shore in the area disputed in this litigation. (Shea's depos., pp. 13-16)

50. Courtland Marchant, a United States citizen, was arrested by enforcement personnel of the United States Fish and Wildlife Service for violating gear spacing regulations (White Act). The violation occurred at a point in Cook Inlet more than three miles from shore in the area disputed in this litigation. The arrest occurred on or about July, 1951. (Marchant's depos., pp. 2-10; Exhibits HI and HJ)

51. George Mosher, a United States citizen, was arrested by enforcement personnel of the United States Fish and Wildlife Service for violating gear spacing regulations (White Act). The violation occurred at a point in Cook Inlet more than three miles from shore in the area disputed in this litigation. The arrest occurred on or about July, 1951. (Mosher's depos., pp. 3-7; 12)

52. Earl Solie, a United States citizen, was arrested by enforcement personnel of the United States

Fish and Wildlife Service for violating gear spacing regulations (White Act). The violation occurred at a point in Cook Inlet more than three miles from shore in the area disputed in this litigation. The arrest occurred on or about July, 1951. (Solie's depos., pp. 2-9; Exhibit FI)

53. Harley Adams, a United States citizen, was arrested by enforcement personnel of the United States Bureau of Commercial Fisheries for violating gear spacing regulations (White Act). The violation occurred at a point in Cook Inlet more than three miles from shore in the area disputed in this litigation. The arrest occurred on or about July, 1957. (Adams' depos., pp. 3-5; Exhibits FJ and FJ1)

54. Sverre Omsund, a United States citizen, was arrested by enforcement personnel of the United States Bureau of Commercial Fisheries in 1957 for fishing in the disputed area of Cook Inlet without a commercial fishing license. Mr. Omsund was fined $150.00. (Omsund's depos., pp. 2-7; Exhibit FH)

55. United States Department of Interior regulations for many years prior to Alaska Statehood prohibited the use of drift gill nets in all of Cook Inlet south of the latitude of Anchor Point. Fishery patrol agents of the United States enforced the prohibition in that portion of Cook Inlet, more than three miles from shore. (Skerry's depos., pp. 3-7; 17-21; Roberts' testimony, Tr. pp. 301-310; Exhibits IU, BD)

56. Patrols of the Fish and Wildlife Service and Bureau of Commercial Fisheries in the Resurrection Bay area generally confined patrols to those areas

lying within a three mile distance from the shore. Patrols in Cook Inlet from Point Gore and Cape Douglas north were not so confined. (Roberts' testimony, pp. 301-318, particularly pp. 310-318)

57. In October 1930 the United States Tariff Commission, in the course of an investigation relating to the entry of fish products into the United States from the high seas on alien owned vessels prepared a map showing the landward boundary of the high seas to indent deeply areas such as Cook Inlet, Dixon Entrance, Chatham Strait, Yakutat Bay, Nushagak Bay and Kviehak Bay. The Alaska maps were ordered destroyed since they constituted an invitation to foreign fishery interests to invade waters which therefore had always been considered as open only to nationals of the United States. (Exhibits CX, AR, CY, CY-1, CY-2)

58. From 1957 through 1959 a regulation of the Department of Interior (50 C.F.R. § 101.19) defined waters of Alaska as all those waters extending three miles seaward from the lines extending between the headlands of inlets. Said regulation did not by its terms exclude Cook Inlet from its application. The regulation defining the waters of Alaska described the waters where, prior to 1967, the fishery regulations of the United States were applicable. Said regulation was transmitted to Canada. (Exhibits IU, IP, JF, BC, DB, EX, IE-1, IE-6 through IE-10)

59. While 50 C.F.R. § 101.19 remained in effect, a conference was held in 1957 between duly author-

ized representatives of the governments of the United States and Canada. The basic purpose of the conferees was to prohibit the citizens of each country from fishing for salmon with nets in international waters in the North Pacific Ocean. There arose a question as to the location of the waters of Alaska and more particularly, a question as to where and how 50 C.F.R. § 101.19 was to be applied. (Exhibit DC)

60. In order to determine the location of international waters off the Alaska coast, the Canadian government requested the United States government to furnish charts to depict thereon the exact location of the waters of Alaska as defined in 50 C.F.R. § 101.19—as opposed to or differentiated from international waters. (Exhibits DC, DD, IE-1 through IE-5)

61. The United States government responded to the request. On or about October 15, 1957 it transmitted to the Canadian government charts depicting a line which thereafter became known as the Gharrett-Scudder line. (*Supra* Finding Nos. 58-60; Exhibits GH-1, GH-2; Naab's depos. (No. 2), pp. 26-33; Scudder's depos., pp. 8-10; Terry's depos., pp. 6-8; Exhibits JF, JJ, FF, FF-1 through FF-4, FF-A; IE-6; Alaska's 17th Request for Production of Documents, request #2; Gharrett's depos., pp. 3-9; Exhibits FX, FY, FZ)

62. The Gharrett-Scudder line in Cook Inlet (Exhibits GH-3, GH-4) depicted the baseline for the

measurement of the territorial sea for purposes of fishery regulation, which enclosed, as inland waters, all of the disputed area in Cook Inlet. (*Supra*, Finding 57; Exhibits AM, IT; Kirkness' depos. (No. 2), pp. 3-15; Rickey's testimony, pp. 684-687; Swanson's testimony, pp. 675-679)

63. The formulation and presentation of the Gharrett-Scudder line by the United States government to the Canadian government was and is a classic demonstration of the assertion by the United States government of its claim to sovereignty over the whole of Cook Inlet, including the area in dispute. (*Supra*, Findings 58-62)

C. *Alaskan Sovereignty*

64. As a consequence of the enactment of the Alaska Statehood Act, both the Alien Fishing Act and the White Act were superseded. The result was that on January 1, 1960, the State of Alaska assumed control of the fisheries formerly within the jurisdiction of the federal Acts.

65. The undisputed evidence indicates that the description of Cook Inlet under the Alaska Commercial Fishing Regulations since statehood has not substantially changed from the definition or description under the federal Acts. Under the Alaska regulations, the Cook Inlet area includes all the waters located inland from the line drawn from Cape Douglas to Point Gore, including the Barren Islands. (5AAC 109.02 (1959)).

66. Those regulations have been published and since 1960 have been distributed to the United States and representatives of Japan, Canada and other foreign nations. No foreign nation has protested the assertion of the State's jurisdiction over the inland and territorial waters of Cook Inlet. (Tr. pp. 637-645; Exhibits IX-1-12; AM; Kirkness' depos. (No. 2) pp. 3-15; record as a whole).

67. The United States, having knowledge of the State of Alaska's assertion of fishery jurisdiction to persons other than its own citizens in all of the disputed area of Cook Inlet, has not objected to, but in fact has acquiesced in Alaska's assertion of jurisdiction and has thereby continued, as opposed to foreign nations, the assertion of American sovereignty over the inland waters and territorial sea of Cook Inlet. (Exhibits ES, CV, FD, AM, IT; record as a whole).

68. The United States, in response to a request by the State of Alaska, transmitted to the State copies of the Gharrett-Scudder line. The State, with the knowledge of the United States, relied on that line in establishing its authority over the disputed waters in Cook Inlet.

69. Since January 1, 1960, when the State of Alaska assumed control of the fisheries of Alaska, its law enforcement officials have patrolled all of Cook Inlet, within the area defined by Alaska regulations, enforcing such regulations against all persons including citizens and non-citizens of Alaska.

70. Thus, again by deeds, rather than mere proclamations, the State of Alaska, since statehood, has

asserted and exercised sovereignty over the disputed area of Cook Inlet, openly, visibly and apparent to all who may have taken occasion to look into the conditions existing in Cook Inlet.

71. On or about July 6, 1970, Frank M. DeRossitt, a non-resident of Alaska, was arrested by an officer of the Alaska Department of Fish and Game more than three miles offshore south of Anchor Point, in the disputed area because of possible illegal fishing with drift gear. (DeRossitt's testimony, Tr. pp. 661-667 and Exhibits JB and JC)

72. On or about July 6, 1970, Kjarten Ask, a non-resident of Alaska, was arrested by an officer of the Alaska Department of Fish and Game more than three miles offshore south of Anchor Point, in the disputed area because of possible illegal fishing with drift gear. (Ask's testimony, Tr. pp. 669-674) and Exhibits JD and JE)

73. The clearest exercise of sovereignty by the State of Alaska occurred in the Shelikof Strait in 1962. The Japanese fishing vessel BANSHU MARU and two other Japanese fishing vessels, in April, 1962, had intruded into the southernmost part of lower Cook Inlet near the Barren Islands for a few hours and then immediately proceeded into the Shelikof Strait.

74. Having been forewarned that such Japanese fishing vessels intended to intrude into these waters in an attempt to establish historic Japanese fishing rights in those areas, the Governor of Alaska sought action by the federal government to forestall an in-

ternational incident and to protect the State of Alaska from these intrusions.

75. The federal government's response to what was regarded by Alaska state officials as an emergency was, at best, belated and, at worst, an unwillingness to act.

76. On a previous occasion, in July, 1961, when foreign whaling vessels had been observed less than three miles from the coast of Alaska, the federal government, as in April, 1962, was unwilling to take action, but encouraged the State of Alaska to act.

77. Consequently, on or about April 15, 1962, law enforcement agents of the State of Alaska arrested three Japanese vessel captains and boarded two Japanese fishing vessels, at least one of which was more than three miles from shore in Shelikof Strait.

78. After the arrests and boardings and with the knowledge of the Government of Japan, the Eastern Pacific Fisheries Company agreed in writing with the State of Alaska not to fish in any part of the disputed area of Cook Inlet. (Ischimura's testimony, Tr. pp. 270-273; Gov. Egan's testimony, Tr. pp. 731-732; Exhibit IV)

79. No fishing by any Japanese citizen or vessel has taken place in Cook Inlet at any time subsequent to the agreement. (Exhibit EB; Ischimura's testimony, Tr. p. 273; Gov. Egan's testimony, Tr. pp. 732 and 746)

80. As a result of the aforementioned agreement by the Eastern Pacific Fisheries Company to refrain from fishing in Cook Inlet and Shelikof Strait, the

cases against the Japanese for illegally fishing in the State of Alaska's waters were not immediately prosecuted. The cases were ultimately dismissed, some years later when there had been no further intrusions by the Japanese into these waters. (Exhibit IV; Gov. Egan's testimony, Tr. p. 732; pre-trial order p. 4)

81. On May 3, 1962 the Japanese government had sent a diplomatic note of protest to the United States Department of State relative to the arrests and boardings by the State of Alaska in Shelikof Strait. (Exhibit II)

82. The official reply sent by the United States to Japan did not, contrary to an intra-departmental suggestion made by one member of the Secretary of State's legal staff, declare that Shelikof Strait or Cook Inlet were international waters. (Exhibit II)

83. On the contrary, the President of the United States, in January, 1963, informed the Governor of Alaska that he did the right thing in seizing the Japanese vessels and arresting the Japanese captains in April of 1962. (Gov. Egan's testimony, Tr. pp. 767-768)

84. Although the evidence is conflicting in the sense that there was some apparent disagreement among the advisors to the Secretary of State, it is clear that the correctness of the action by the State of Alaska, in effecting the aforementioned seizures and arrests, has never been officially denied by the United States, although the aforementioned Japanese

note of protest requested the United States to repudiate the validity of the actions of the State of Alaska.

85. By refusing to accede to the Japanese diplomatic note, the United States acquiesced in the action of the State of Alaska; however, it may be pointed out that there is no clear evidence that the Department of State has expressly stated that the Alaskan officials acted properly.

IV. Continuity of Exercise of Sovereignty

86. The exercise of sovereignty over Cook Inlet, the nature of which is indicated in the foregoing Findings, has continued for such period of time as to have developed into a usage. (Record as a whole)

87. Russia exercised sovereignty over all of Cook Inlet continuously from at least 1821 through 1867. (*Supra*, Findings 18-21, incl.)

88. The exercise of sovereignty by the United States over the disputed area of Cook Inlet has existed without interruption continuously from at least 1906, and possibly earlier, to the time this dispute arose. (*Supra*, Findings 22-63, incl.)

89. The legislative enactments and federal regulations of the United States applicable to the disputed area have been applied consistently and without interruption for a sufficient time to give rise to a usage by the United States and its successor, the State of Alaska, over the disputed waters.

90. The State of Alaska has exercised continuous authority and sovereignty over the disputed waters

from 1959 to the present. (*Supra*, Findings 65-83, incl.)

91. Hence, the exercise of authority over Cook Inlet by Americans has lasted for more than sixty-six years. (*Supra*, Findings 22-83, incl.)

V. Attitude of Foreign Nations

92. Foreign nations have tolerated and acquiesced in such exercise of sovereignty over Cook Inlet.

93. No protest of a foreign country was made to the exclusive Russian dominion over Cook Inlet.

94. No protest of a foreign nation was made to the application or enforcement of either the Alien Fishing Act or the White Act to all of the disputed area of Cook Inlet.

95. Canada, the foreign nation which would be one of the most keenly interested countries in the status of Cook Inlet, accepted the placement of the Gharrett-Scudder line, hereinabove mentioned. (Terry's depos., p. 13; Findings 58-63)

96. Likewise, neither Canada, Japan, nor any other nation has protested the definition of the waters of Alaska as publicized in 1957 and in subsequent years by both the United States and the State of Alaska Commercial Fishing Regulations. (Middleton's testimony, Tr. pp. 638-644)

97. The exercise of authority over Cook Inlet by persons and states who controlled its shores has been notorious and well documented over a period of more than sixty-six years. (DeArmond's testimony, Tr. pp. 520-570)

98. The openness and notoriety of the claim over the disputed waters of Cook Inlet were such that all foreign nations knew or should have known of the claim.

99. Since the arrest of the BANSHU MARU there have been intrusions into other waters off the Alaskan coast by Japanese, Soviet, Korean and Canadian vessels; nevertheless, there have been no such documented intrusions into lower Cook Inlet, except as noted hereunder in Finding 100. (Gov. Egan's testimony, Tr. pp. 732, 746; Exhibits 118, EB)

100. Although, undoubtedly, the United States has made an exhaustive study of its records, it has only been able to offer evidence—inconclusive and disputed—which, if believed, would show only a few isolated intrusions of Canadian halibut vessels inside Cook Inlet, at least one of which was within the territorial sea of Cook Inlet. (Exhibits 78, 78A, 80; Hodgson's depos., Exhibit 5; Costello's depos., pp. 29-31)

101. The number of such Canadian halibut vessels has been so small as to be *de-minimis*—particularly so when there is considered: (a) there were possibly only two undetected such occurrences before Alaskan statehood; (b) afterwards only five Canadian vessels have fished for halibut in Cook Inlet, none of which were detected by state law enforcement officials; (c) the time in question goes back more than sixty-six years; (d) never has there been any other foreign fishing activity, such as, for salmon or other species; (e) the traditional ties of friendship between the

United States and Canada; and (f) historic title had already ripened to the disputed area. (Exhibits 78, 78A, 80; Costello's depos., pp. 29-31; Exhibits Q, R; Day's depos., p. 17; Exhibits DZ and EA; O'Dale's depos., pp. 20-21; Scudder's depos., p. 30; Headlee's testimony, Tr. pp. 343-344; Wardleigh's depos., p. 13; Naab's depos. (No. 1) pp. 50-51; Shea's depos., p. 17; Wilson's depos., p. 14; Skerry's depos., pp. 30-31; Roberts' testimony, Tr. p. 319.)

102. The infrequent and isolated nature of Canadians—no other foreigners—fishing within the waters of Cook Inlet reinforces the view that Cook Inlet has been recognized by foreign nations as inland waters of Alaska and the United States.

VI. Miscellaneous Findings

103. The so-called disclaimers relied upon by the United States government are ineffectual because (a) they are refuted by historic evidence, referred to above, which is clear beyond doubt; (b) they were hastily prepared, based on questionable research, and offered in a self-serving effort by the federal government to have the Court disregard historic facts; and (c) came at a time when historic title had already ripened into ownership of the disputed area of Cook Inlet.

104. The background investigation pertaining to the letter from Abram Chayes to Frank J. Barry dated May 3, 1962 was done by a staff assistant in the Office of the Secretary of State's Legal Advisor.

The investigation was limited to records of the State Department. (Exhibit 58; Chayes' depos. pp. 5-12; Yingling's depos. pp. 5-12; 15-16; 18-21)

105. The background investigation pertaining to said letter was inadequate in that: (a) not all of the records of the State Department or other departments necessary to form an adequate basis for the conclusions contained in said letter were searched; (b) an adequate investigation would have required research by one person of at least three months, whereas in fact, the one person assigned to the project took only six days. (Simon's depos., p. 54-55; Exhibits HT; HT-1; Alaska's 11th Set of Interrogatories No. 4)

106. The conclusions contained in the letter from Leonard Meeker to Shiro Kashiwa, dated July 3, 1969, were based on no research other than that referred to above, plus an insignificant amount of additional research. (Carter's depos., pp. 6-11)

107. The charts depicted by Exhibit 73 were drafted by the Law of the Sea Baseline Committee at a time when this case was pending in this court. Among the members of that committee at the time was the principal attorney for the United States in this litigation. Said exhibit cannot be said to be an unbiased product. (Hodgson's depos., pp. 10-15; Exhibits HY, HX, IB, IC, IC-1)

108. The background factual research pertaining to Exhibit 73 was based upon no information other than that referred to in Findings 104-106. (Hodgson's depos., pp. 6-7; 44-45; 48-49)

109. Contrary to the position now advanced by the United States in lower Cook Inlet, the Baseline Committee determined Long Island Sound to be historic waters of the United States in the absence of a declaration by the Executive Branch to that effect. The Baseline Committee failed to discuss, in its deliberations, the possible historic status of Cook Inlet and it is clear such committee did not have before it the evidence which has been presented to this Court. (Hodgson's depos., pp. 49, 151-153; 157-159; Exhibit HX)

110. Evidence is lacking to show that Exhibits 66, 86, 91, 108 and 110 are based on research other than that referred to above.

111. Likewise the filing of this complaint and the unproven allegations made therein by the United States government are not effective disclaimers.

Conclusions of Law

1. The Court has jurisdiction of this action under 28 U.S.C. § 1345.

2. The controlling issue, presenting mixed questions of law and fact, is stated in the pre-trial order as follows:

> "Whether the United States or the State of Alaska is entitled to the natural resources of the seabed and subsoil of Cook Inlet between the line designated as "T" on Exhibit A, as attached hereto, and the line designated "SL" on Exhibit B, as attached hereto, or any part thereof."

3. The controlling principles of law are clear and undisputed insofar as historic bays are concerned. In the main there has been little difference between the parties as to these principles of law. Hence, this case has turned, in large part, upon the significance to be accorded the facts presented herein, within the framework of the legal conclusions set out below.

4. Section 6(m) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 343, provides that:

> "The submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder."

5. Section 4 of the Submerged Lands Act of 1953, U.S.C. § 1312, provides that:

> "The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to the line three geographical miles distance from its coast line . . ."

6. Section 2(c) of the Submerged Lands Act of 1953, 43 U.S.C. § 1301(c) provides that:

> "The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the *seaward limit of inland waters.*" (Emphasis added)

Congress left undefined the term "inland waters", leaving such term subject to judicial interpretation.

7. The United States Supreme Court has adopted, and this Court applies, the definition of inland waters set forth in terms of international law in the Convention on the Territorial Sea and Contiguous Zone. (T.I.A.S. No. 5639)

8. Section 4 of Article 7 of such Convention provides that:

> "4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters."

It is apparent that this requirement is not satisfied as to lower Cook Inlet—the area here in dispute.

9. However, Section 6 of Article 7 of the Convention on the Territorial Sea and Contiguous Zone provides that: "the foregoing provisions shall not apply to so-called 'historic bays' . . ."

10. The historic bay exemption of the Convention is the focus of the complex controversy presently before the Court. If lower Cook Inlet, the area in dispute, is an historic bay within the meaning of the Convention, that body of water is thus inland water within the meaning of the Submerged Land Act, with the result that the State of Alaska would have the exclusive right to the subsurface resources.

11. The burden of proof is upon the State of Alaska to show affirmatively that lower Cook Inlet

is an historic bay, failing which the result is that the United States would have exclusive right to the subsurface resources.

12. There is some uncertainty in the law concerning the quantum of proof required for a showing of historic title. The uncertainty revolves about the question as to whether the burden of proof is measured by the expression "clear beyond doubt"—a rigorous standard of proof—or by the "preponderance of evidence" rule ordinarily applicable to civil suits—a less rigorous standard.

13. Despite this uncertainty over the burden of proof, the Court has adhered to the higher standard of proof and the foregoing Findings of Fact have been made by the Court under the more rigorous standard—"clear beyond doubt".

14. There are three requirements for establishing historic title to the disputed waters, the first of which is the effective exercise of authority or sovereignty by the nation claiming the historic right.

15. Among the acts by which sovereignty is exercised are those which deny to foreign fishing vessels the right to fish in the disputed waters.

16. It is not necessary for the nation making the historic claim to undertake particular acts of enforcement if the laws and regulations were respected by foreign nations. It is only required that if an act of enforcement was necessary to maintain sovereignty, that such action was taken.

17. The State of Alaska has produced evidence which establishes clearly beyond doubt that there has

been such sufficient exercise of sovereignty over lower Cook Inlet, the area in dispute, as indicated in the Findings of Fact stated above.

18. The second requirement for establishing historic title to disputed waters is the continuity of the exercise of authority over a period of time sufficient to create a usage. No precise length of time is necessary to create a usage on which historic title is based. Since there are no precise time limit criteria, the lapse of time necessary to permit emergence of historic title is a matter of sound judgment.

19. The evidence produced by the State of Alaska proves clearly beyond doubt that the exercise of authority over lower Cook Inlet has existed without interruption from 1906, or even earlier, until the time this dispute arose. The legislative enactments and regulations, referred to in the Findings of Fact above, have been applied and enforced consistently and without interruption for a sufficient time to give rise to a usage over the disputed waters in lower Cook Inlet.

20. The final requirement for establishing historic title is the attitude of foreign nations. The precise attitude required has been defined by some as acquiescence and by others, perhaps most, as toleration. The United States Supreme Court has used language which indicates that the higher standard, acquiescence, is required. The distinction is immaterial in this case since, as a matter of law, the requirement has been satisfied under the higher standard of acquiescence. Under the Findings set out above, the community of nations has acquiesced, clearly beyond

doubt, in the emergence of historic title in the waters in dispute.

21. In making these Findings of Fact and in reaching these Conclusions of Law, the Court is mindful of the need for judicial restraint. In this connection the Court recognizes that the conduct of foreign relations is constitutionally vested within the exclusive control of the Executive and Legislative Branches of the United States government.

22. Nevertheless, in the case at bar, as in other cases between the federal and state governments, courts have traditionally exercised jurisdiction to resolve fundamental law questions and basic fact issues between state and federal governments.

23. In this controversy the claim that the disputed area of Cook Inlet is an historic bay must and has been viewed by the Court as if being made by the United States and opposed by another nation.

24. There cannot be a contraction of a state's recognized territory imposed by the federal government, as the United States government would attempt to do here, in the name of foreign policy.

25. State exercises of dominion, as distinguished from federal assertions of sovereignty may properly be considered on the issue of historic title. Hence, the exercise of dominion by the State of Alaska over Cook Inlet, as stated in the Findings of Fact above, has been considered by the Court as relevant to the existence of historic title, as well as other evidence of dominion by prior sovereignties, particularly the United States government.

26. The Court finds it would be inequitable in adopting the principles of international law to the resolution of this domestic controversy to permit the United States government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to the past events reflected in the Findings of Fact above.

27. As a matter of law, in the context of this litigation, disclaimers by the Executive Branch of the United States government with respect to the status of Cook Inlet are not binding upon this Court, since they constitute the impermissible contraction of authority cautioned against by the United States Supreme Court in *United States* v. *California*, especially in view of the clear evidence of continuous assertions of sovereignty by the United States over the waters in dispute.

28. The first disclaimer was a letter from the Secretary of State's Legal Advisor to Frank J. Barry, dated May 3, 1962. As of that time historic title, as indicated in the Findings of Fact above, had already ripened into ownership by the United States and had subsequently passed to the State of Alaska upon statehood in 1959.

29. In the light of the Findings of Fact hereinabove stated, the failure to assert jurisdiction over the few isolated instances of Canadian halibut fishing vessels in Cook Inlet does not defeat the claims of the United States and Alaska to Cook Inlet as an historic inland water bay.

30. Historic title, as further indicated in the Findings of Fact, had already ripened before the Canadian intrusions. Consequently, the presence of those vessels is neither relevant nor controlling upon the issue of creation of historic title.

31. Considering the extreme and continuous measures taken, first, by the United States authorities and, secondly, by the Alaskan authorities, to protect their fisheries, the Court concludes that had the Canadians been present in greater numbers, or on more frequent occasions, or had been fishing for salmon instead of halibut, the American fishing regulations would have been enforced against them. Indeed, the sparsity of such foreign intrusions is further clear evidence that foreign nations, having a possible interest in lower Cook Inlet, have respected American dominion over those waters.

32. In the light of its Findings of Fact, the Court concludes that the requirements for the emergence of historic title in and to the State of Alaska have been satisfied under the general principles of international law hereinabove enunciated.

33. In Cook Inlet, Alaska the line marking the seaward limit of the inland waters of Cook Inlet, Alaska is the line extending from Cape Douglas to the southernmost point of the Barren Islands and thence to Point Gore, as designated on Exhibit B to the Pre-Trial Order.

34. In Cook Inlet, Alaska, the line marking the baseline from which to measure the territorial sea is the line extending from Cape Douglas to the southernmost point of the Barren Islands and thence to Point Gore, as designated on Exhibit B to the Pre-Trial Order.

35. The territorial sea of Cook Inlet, Alaska extends three miles seaward from the line described in Conclusions Nos. 33 and 34, that is, to the line designated "SL" on Exhibit B to the Pre-Trial Order.

36. The State of Alaska has the right to, title in, and ownership of the seabed and subsoil of the inland waters of Cook Inlet defined in Conclusion No. 33.

37. The State of Alaska has the right to, title in, and ownership of the seabed and subsoil of the territorial sea of Cook Inlet defined in Conclusion No. 35.

DATED at Anchorage, Alaska this 29th day of January, 1973.

/s/ James A. Von Der Heydt
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a true and correct copy of the above and foregoing Amended Findings of Fact and Conclusions of Law Proposed by the State of Alaska to Mr. A. Lee Peterson, Assistant United States Attorney, Anchorage, Alaska 99501; Mr. Bruce C. Rashkow and Mr. Edward F. Bradley, Jr., Attorneys, Department of Justice, Washington, D.C. 20530, this 29 day of January, 1973, by United States mail.

/s/ Charles K. Cranston
CHARLES K. CRANSTON

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2400 (D.C. #A-45-67)

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

v.

STATE OF ALASKA, DEFENDANT/APPELLEE

APPEAL from the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST: JUNE 5, 1974
EMIL E. MELFI, JR.
Chief Deputy and Acting Clerk
by /s/ Ray Hewitt
RAY HEWITT
Senior Deputy

Filed and entered March 19, 1974

[SEAL]

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No, 73-2400

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ALASKA, APPELLEE

ORDER FOR RECALL AND STAY OF MANDATE

IT IS HEREBY ORDERED that the Motion of the United States for Recall and Stay of the Mandate to the extent it affects foreign fishing and navigation in the disputed area in Cook Inlet for an initial 30-day period and upon certification of the Supreme Court that petition for a writ of certiorari has been filed therein to continue until the final disposition of this case is granted.

/s/ J. Clifford Wallace
J. CLIFFORD WALLACE
United States Circuit Judge

Date

APPENDIX F

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1973 No. 52 Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA, DEFENDANT

Report of Albert B. Maris, Special Master
January 18, 1974

* * * *

> have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.' Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B. Int'l L. Comm'n 1, 13, U.N. Doc. A/CN. 4/143 (1962)."

From these opinions of the Court and the authorities upon which they rely, I conclude that the criteria for establishing the existence of an historic bay or historic inland waters are three. First, there must be an open, notorious and effective exercise of sovereign authority over the area not merely with

respect to local citizens but as against foreign nationals as well; second, this authority must have been exercised for a considerable period of time; and, third, foreign states must have acquiesced in the exercise of this authority as against their nationals.

The extent of the limits of sovereign jurisdiction in the maritime belt along the coasts of the United States is a political question for the federal government, to be determined by its legislative and executive branches. *United States* v. *California*, 1947, 332 U.S. 19, 33-34. It would follow that a disclaimer by the United States of jurisdiction in any part of that area should, as the Court indicated in *United States* v. *California*, 1965, 381 U.S. 139, 175, ordinarily bar any claim to such jurisdiction by the state involved. The Court there pointed out, however, as we have seen, that the evidence supporting a state's historic claim might be clear beyond doubt, in which case the federal disclaimer would not be decisive. And in *United States* v. *Louisiana*, 1969, 394 U.S. 11, 75-77, the Court held that in a controversy in this field between a state and the United States, the state may, in support of its claim to historic inland waters, rely upon evidence of its own state activities in the area as well as any activities of the United States.

In the present case, the United States takes the position that it has disclaimed any historic title to or sovereign jurisdiction over the extensive area which the State of Florida claims as Florida Bay. In *United States* v. *California*, 1965, 381 U.S. 139, the disclaimer of the United States in the litigation itself

was held sufficient to bar the state claim. Here there is not only disclaimer in the litigation but additional evidence of activities and statements by officials of the United States of continued disclaimers of historic title to the waters in question. Included in this evidence is a series of maps of the coastline [United States Exhibit No. 101] which indicate the extent of the claim of the United States to the territorial sea along the coast of Florida and which were furnished to foreign nations for their information. The burden, therefore, is cast upon the State of Florida to establish by historic evidence which is "clear beyond doubt" that its historic claim meets the three criteria which I have described above and may, therefore, be sustained as against the federal disclaimer.

I turn then to consider the evidence which the State of Florida has offered in support of its claim. First, of course, is the boundary claimed by the 1868 Constitution approved by Congress which it asserts includes the entire area southeast of a straight line bearing 045° from north from the Dry Tortugas to Cape Romano which entire area it calls Florida Bay, as I have said, and claims as historic inland waters. If its construction of the boundary language is correct, which I have concluded it is not, this 1868 origin of its claim would certainly be remote enough in time to satisfy the second criterion for historic inland waters.

The first and third criteria, however, must also be met. The State must show that it, or the United States, exercised open, notorious and effective sover-

eign authority in the area as against the nationals of foreign states and that the foreign states acquiesced in the exercise of authority. As to this, the evidence submitted by the State is limited indeed. There is no evidence whatever that the federal government either claimed or exercised such authority over the area beyond the coastal belt of territorial sea recognized by maritime states. The evidence offered by the State that in 1826 a federal revenue cutter drove off "Bahama Turtlers who have heretofore occupied the Florida coast in pursuit of that employment" [Florida Exhibit No. 74], seems clearly to have related to the belt of territorial sea along the coasts of the Keys and the shallow waters between them where it appears that turtles were taken. The exercise of authority within that coastal belt would, of course, have no bearing at all on the question whether sovereign authority had been exercised and enforced on the high seas beyond the limits of that belt.

The State offered a series of maps dating back to 1854 which more or less clearly designate as Florida Bay the area now claimed by the State as its internal waters. I find, however, that this area has not been consistently treated by geographers and cartographers as a bay. Moreover, such a designation throws little or no light on the question whether the State actually exercised sovereign authority in the area.

The most common exercise of sovereignty in inland waters is the special control and, often, prohibition of navigation by foreign vessels and of fishing by

foreign nationals. The State of Florida offered no evidence that either it or the federal government had ever attempted to control or prohibit the mere navigation by foreign vessels of the area in question. There is evidence, however, that as early as December 17, 1845, shortly after its admission to the Union, the State of Florida passed an act (Chapter 34) prohibiting non-residents without a license from taking fish in Florida waters for export or sale. This act was superseded on February 12, 1861 by an act (Chapter 1121) which prohibited non-citizens of the State without a license from taking fish or turtle "on the coast, or in any of the seas, bays, rivers, creeks or harbors, or within a marine league of the coasts of said State" for export or sale. In 1893 the State passed an act (Chapter 4212) prohibiting non-citizens of the United States from catching food fishes for sale or export "in the public waters of the State" or without a license from taking "any fish within the jurisdiction of the State" for other than their own individual use. And in 1915 the State passed an act (Chapter 6877) declaring "all fish in the rivers, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connected with the Gulf of Mexico or the Atlantic Ocean, or in the Gulf of Mexico or Atlantic Ocean, within the jurisdiction of the State of Florida" to be, and to continue and remain, the property of the State, to be taken and used by citizens and non-citizens under the restrictions and conditions imposed by the Act. It will be seen that all of these acts relate to the

taking of fish within the "public waters of the State" or "within the jurisdiction of the State" without indicating except in one instance the distance from the coast to which those waters or that jurisdiction extended. And in the Act of 1861 which did specify that distance it was stated to be one marine league. The reference to "bays" in some of these acts was certainly inadequate to refer to the large expanse of the Gulf of Mexico which the State of Florida now claims as a bay. These acts appear to furnish little ~~or~~ no support for a finding that the State exercised authority in that area.

In 1957, subsequent to the enactment of the Submerged Lands Act, the State of Florida passed an act (Chapter 57-358) prohibiting shrimping by anyone in certain portions of the area with which we are here concerned, which the director of the Department of Conservation was authorized to close from time to time in the interest of conserving shrimp. These areas are described as the Tortugas shrimp bed. This Act was amended in 1961 (Chapter 61-470), and further amended in 1970 (Chapter 70-163) to extend the area of the Tortugas shrimp bed.

In 1963 the State enacted the Florida Territorial Waters Act (Chapter 63-202) the purpose of which was to exercise and exert full sovereignty and control over the territorial waters of the State. Section 4 of the Act made it unlawful for any unlicensed alien vessel to take any natural resource of the State's "territorial waters, as such waters are

described by article 1 of the Constitution of Florida." It will be recalled that in 1963 the constitutional boundaries which described and delimited the territorial waters of the State were those set out in the 1962 Constitutional amendment and on the Gulf coast ran three marine leagues offshore from the Dry Tortugas, the Florida Keys and the mainland of the State. The Florida Territorial Waters Act, as enacted in 1963, accordingly did not purport to apply to the area beyond the three-league limit which is here in dispute.

Randolph Hodges, Executive Director of the Florida State Department of Natural Resources, testified that between 1957 and 1968 his department considered the State boundary north of the Keys to begin at the Dry Tortugas and run generally parallel with the Keys along their northern side back toward the mainland. It was in 1968, as we have seen, that the Constitutional boundary was extended out into the Gulf to enclose the entire area here in question. It seems clear from the evidence that the State of Florida has never, before or since 1968, seized a foreign vessel in the disputed area beyond the three-league limit for violating its laws. Mr. Hodges so testified and Dr. Samuel Proctor, another witness for the State, corroborated this fact. The nearest approach to a suggesiton of such action is a statement in the complaint filed on December 18, 1970 by the United States against the State of Florida in the United States District Court for the Northern District of Florida, Civil Action No. 1672, Tallahas-

see, that the State of Florida was threatening to arrest foreign boats fishing for shrimp in the area in dispute. It was not alleged, however, that the State had actually done so.

The only other evidence in support of the State's claim to the area in dispute which need be mentioned is the fact that the State on October 4, 1941 granted an option to lease large tracts of submerged lands in the area for oil exploration. Leases were subsequently granted to private individuals and corporations in 1944, 1949 and 1951. Actual exploration was conducted with negative results and the leases expired in 1964 and were not renewed. It will be seen that the leases were given only nine years, at the earliest, before the enactment of the Submerged Lands Act and have all since terminated. They do not disclose a usage sufficiently remote in time to meet the second criterion for historic inland waters. Nor do I think that they afford evidence of a use adverse to foreign nations in light of the accepted view in recent years that maritime nations have special rights in the bed of the continental shelf off their coasts.

The State of Florida is here claiming that all the waters of the Gulf of Mexico southeast of a straight line from the Dry Tortugas running due northeast to Cape Romano on the mainland are historic inland waters of the State. I am satisfied, however, that the evidence offered in support of this claim does not meet the test of being clear beyond doubt. The claim must, therefore, be rejected.

* * * * *

APPENDIX G

DEPARTMENT OF STATE
THE LEGAL ADVISER
Washington

[SEAL] April 19, 1974

Mr. Wallace H. Johnson
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Johnson:

I am writing in response to your letter of March 28, 1974, informing me of the Ninth Circuit Court of Appeals decision in *United States* v. *State of Alaska*, C.A. 9, No. 73-2400. Your letter indicates that the Court of Appeals affirmed the decision of the lower court, holding that the waters in Cook Inlet landward of a line drawn from Cape Douglas to the southernmost point of the Barren Islands and thence to Point Gore are internal waters of the United States, based on an historic claim.

As we have indicated previously, the Department of State has not considered Cook Inlet to be an historic bay. On May 3, 1962, Mr. Abram Chayes, the State Department Legal Adviser, informed the Department of Interior that "an extensive search of the records of the Department and of the historic records of the Government in the National Archives

has revealed no evidence that the United States has ever at any time claimed the waters of Cook Inlet as internal waters of the United States," and that it was the opinion of the Legal Adviser "that there is no basis for the assertion by Alaska of a claim to all of Cook Inlet as historic waters." Moreover, in a letter dated July 3, 1969, Mr. Leonard Meeker, then Legal Adviser, stated that "since May 1962 the United States has not asserted any claim over Cook Inlet as historic waters and has not exercised sovereignty over the area outside of the territorial sea measured from the twenty-four (24) mile closing line described in the pre-trial statement for the United States in the above case [*United States* v. *State of Alaska*]." Again on April 17, 1973, Mr. Charles Brower, Acting Legal Adviser, stated in a letter to Mr. Kent Frizzell, Assistant Attorney General, that "[s]ince the date of the letter from Mr. Meeker the United States has not asserted any claim of historic waters nor exercised sovereignty over the area of Cook Inlet outside the territorial sea measured from the . . . twenty-four mile closing line."

As you may be aware, Article 7(6) of the 1958 Convention on the Territorial Sea and Contiguous Zone recognizes the existence of "historic" bays. However, certain international law standards must be met before an historic claim may be validly asserted:

> (1) open, notorious and effective exercise of authority over the area by the State claiming the right;

> (2) continuous exercise of authority;
>
> (3) acquiescence of foreign nations in the exercise of that authority.

These standards have been noted by the Supreme Court with apparent approval, *United States* v. *Louisiana*, 394 U.S. 11, at 23, n. 27 (1969), and were recognized by the District Court, *United States* v. *Alaska*, 352 F. Supp. 815, 818-20 (D. Alaska 1972), and the Court of Appeals, *United States* v. *Alaska*, C.A. 9, No. 73-2400, at 3 (9th Cir., March 19, 1974), in this case.

Throughout the course of this litigation, this Department has followed the case closely. After nearly four years of factual development by the parties, we see no more evidence to support a claim of historic waters than existed in 1962 when the Legal Adviser found that no basis for assertion of such a claim existed. After review of the findings of fact in this case, it is our opinion that there is no evidence of any act which could establish a claim based on the applicable international criteria.

This Department is loath to make an international assertion of United States jurisdiction over areas now considered high seas on the basis of a claim which is unfounded under the applicable international standards. To do so could have serious adverse implications for our foreign relations.

The United States has considered Cook Inlet not to be internal waters in the conduct of its foreign policy. This is evidenced, first, by our reciprocal fisheries agreement with Canada, which was ne-

gotiated and renewed on the assumption by both parties that Cook Inlet contains areas of high seas. This agreement, which is beneficial to the fishermen of both countries, expires on April 24, 1974, and negotiations for its extension have been severely complicated by the decision of the Court of Appeals. In addition, the United States has distributed official charts to foreign nations that depict Cook Inlet as containing areas of the high seas, and these foreign nations have a right to rely on such charts.

Moreover, in order to discourage assertions of national sovereignty over high seas areas, which can have deleterious effects on international relations, security and commerce, we have consistently maintained the position that extensions of internal waters should be limited, and particularly that the standards for establishment of historic claims should be strictly interpreted and applied. On this basis we have protested and refused to recognize certain claims of other countries which do not meet the international standards set forth above. Any indication that we have changed our view of international law and would accept less strict compliance with these standards could encourage other States to make claims to expanded jurisdiction. Our ability reasonably to resist these claims would be hampered, and, therefore, our rights to navigation and overflight could be harmed. Furthermore, such claims could detrimentally affect our ability to reach a satisfactory multilateral agreement which achieves our oceans objectives in the Law of the Sea Conference.

As you may know, the United States is heavily involved in negotiations for the Law of the Sea Conference, which begins its substantive session in Caracas, Venezuela, on June 20, 1974. A major objective of the United States in this Conference is to achieve agreement on narrow limits of national sovereignty in the ocean, coupled with agreement on appropriate coastal state rights over certain coastal resources beyond such limits which do not impair navigation, overflight, and other traditional freedoms of the high seas. We have strongly opposed extensions of jurisdiction by other countries, because it is our opinion that a proliferation of claims at this time could seriously impair the likelihood of a successful Conference. In light of these factors, this Department believes the United States Government should not make assertions of sovereignty on the high seas which are at variance with past application of international law by the United States.

For the reasons stated above we strongly request that you petition the Supreme Court for a writ of certiorari in this case, and that you seek appropriate action by the courts to prevent enforcement against foreign nations until a final decision has been reached on appeal. In this connection, I should note that halibut fishing season in this area begins on May 17, 1974, and that seizure of a foreign fishing vessel in Cook Inlet would be seriously inconsistent with United States policy, would impair our efforts to negotiate a solution favoring narrow limits of national sovereignty in the Law of the Sea Conference, and would

harm our relations with other States concerned. Such harm would not be remedied by a later reversal of the Circuit Court decision.

Please communicate with me again if this Office can provide further information or assistance in this matter.

Sincerely,

/s/ Carlyle E. Maw
CARLYLE E. MAW

APPENDIX H

AFFIDAVIT

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

Stuart Blow, being duly sworn, deposes and says:

1. That he is Acting Special Assistant to the Secretary of State for Fisheries and Wildlife and the Acting Coordinator of Ocean Affairs on behalf of the United States.

2. That he is the senior Departmental adviser on policy formulation and action involving foreign fishing operations off the coast of the United States and for safeguarding the rights and interests of American fishermen on the high seas and off the coasts of other countries; that he has primary responsibility for formulating and negotiating international treaties and agreements relating to fisheries.

3. That on behalf of the United States he participated in negotiations which established the first Reciprocal Fisheries Agreement between the United States and Canada in 1970.

4. That he has participated in fisheries negotiations with Canada on behalf of the United States for 16 years.

5. That in fisheries negotiations conducted during that period the United States and Canada always assumed that Cook Inlet contained high seas.

6. The Reciprocal Fisheries Agreement with Canada permits fishing by Canadian vessels and crews in high sea areas over which the United States claims fisheries jurisdiction and fishing by United States vessels and crews in high sea areas over which Canada claims fisheries jurisdiction.

7. That the Reciprocal Fisheries Agreement permits United States vessels to fish in extensive areas on both the Pacific and Atlantic coasts from which Canada excludes vessels of other nations.

8. That Canada claims that Canadian vessels and crews fished for halibut in the contiguous fisheries zone in Cook Inlet both prior and subsequent to the time the United States entered the Reciprocal Fisheries Agreement with Canada.

9. That both Canada and the United States negotiated the 1970 Reciprocal Fisheries Agreement in the belief that an area of high seas within Cook Inlet had been designated as a contiguous fisheries zone within which foreign fishermen could obtain rights to fish on a regular basis only by terms of an international agreement to which the United States is a party.

10. That the existing Reciprocal Fisheries Agreement permits Canadian fishermen to fish for halibut in the United States contiguous fisheries zone within Cook Inlet.

11. That the Reciprocal Fisheries Agreement with Canada was to have expired by its terms on April 24, 1974.

12. That the Reciprocal Fisheries Agreement provided an opportunity for extension and modification after consultation between the parties but prior to termination on April 24, 1974.

13. That he consulted with the Canadian Government in an effort to obtain a one-year extension of the Reciprocal Fisheries Agreement.

14. That the Canadian Government refused to proceed with a one-year extension of the Reciprocal Fisheries Agreement which would take into account the decision by the United States courts that Cook Inlet is historic internal waters because the United States refuses to recognize any of Canada's claims to prevent foreign fishing in areas of high seas within "fishery closing lines."

15. That Canada refused to renew the Reciprocal Fisheries Agreement for the additional reason that the decision of United States courts that Cook Inlet is inland waters prohibits Canadian halibut vessels from fishing anywhere within Cook Inlet and alters a fundamental condition upon which the Agreement was originally entered.

16. That the Canadians indicated that it will in all likelihood be impossible to renegotiate the Reciprocal Fisheries Agreement in its present terms if the Reciprocal Agreement lapses.

17. That Canada has agreed to a temporary extension of 14 days to permit the United States to seek a stay to prevent the decision of United States courts from terminating the Reciprocal Fisheries Agreement.

18. That if the Reciprocal Fisheries Agreement lapses because the United States is unable to obtain a stay within the period of the temporary extension it is very likely that Canada will exclude American vessels and crews from fishing within its reciprocal fisheries area, straight baselines and historic waters on both the Pacific and Atlantic coast of Canada.

19. That the threat of seizures of American vessels will create a conflict between the United States and Canada with respect to fisheries jurisdiction.

20. That conflict between the United States and Canada with respect to Canada's claim to jurisdiction within "fisheries closing lines" has been avoided by permission extended to United States vessels to fish within those lines by the Reciprocal Fisheries Agreement.

21. That numerous United States fishermen depend for their livelihood upon permission to fish within areas over which Canada claims a right to exclude foreign fishermen.

22. That the livelihood of numerous United States fishermen will be seriously damaged by the lapse of the Reciprocal Fisheries Agreement and the resulting conflict between United States and Canada.

23. That the lapse of the Reciprocal Fisheries Agreement will have a detrimental effect upon other bilateral and multilateral fisheries treaties to which both Canada and the United States are parties.

24. The lapse of the Reciprocal Fisheries Agreement and the irreparable damage to foreign relations concerning fisheries and other oceans matters

which will occur if it does lapse cannot be prevented unless a stay of the decision of United States courts that Cook Inlet is internal waters is obtained.

/s/ Stuart Blow
STUART BLOW

Subscribed and sworn to before me this 30 day of April, 1974.

/s/ Yvonne B. Shepard
YVONNE B. SHEPARD
Notary Public in and for
the District of Columbia

My Commission expires 9/30/78.

[SEAL]

APPENDIX I

AFFIDAVIT

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

John R. Stevenson, being duly sworn deposes and says:

1. That he is the Special Representative of the President for the Law of the Sea Conference and the Chief of Delegation with the rank of Ambassador; that he has held this position since August 6, 1973.

2. That he is the senior United States representative and negotiator in the Third United Nations Conference on the Law of the Sea, which will begin its substantive session in Caracas, Venezuela on June 20, 1974; that he has primary responsibility for United States participation in the formulation and negotiation of a Law of the Sea treaty; and he has worked and continues to work closely with the senior negotiators of other countries in carrying out his responsibilities to attempt to negotiate a successful treaty which will meet United States objectives.

3. That from July 14, 1969 through December 31, 1972, he was the Legal Adviser of the Department of State, during which time he was also active in preparatory negotiations and formulation of United States policy for the Law of the Sea Conference.

4. That the success of the negotiations on fisheries will influence negotiations on other issues such as navigation, passage through straits and jurisdiction over seabed resources and will have an effect on the success of the Conference as a whole.

5. That Canadian cooperation in the Law of the Sea negotiations is important to the United States in achieving an acceptable solution on fisheries at the Conference.

6. That Canada claims fisheries jurisdiction within "fisheries closing lines" which extend seaward a great distance from its coast.

7. That the United States does not recognize Canada's claim to fisheries jurisdiction within "fisheries closing lines."

8. That the bilateral Reciprocal Fisheries Agreement with Canada has avoided conflict between United States and Canada with respect to fisheries jurisdiction by permitting United States fishermen to fish inside Canada's "fisheries closing lines."

9. That Canada is unlikely to renegotiate or renew the Reciprocal Fisheries Agreement if the United States is unable to prevent Cook Inlet from being closed to foreign fishing as a result of United States Court decisions that Cook Inlet is historic inland waters.

10. That if the Reciprocal Fisheries Agreement lapses Canada may well enforce fisheries jurisdiction within its "fisheries closing lines" and might seize United States fishing vessels within those areas.

11. That in order to maintain its position with respect to the rights of United States fishermen, the United States would have to oppose Canadian enforcement of its fisheries jurisdiction within its "fisheries closing lines."

12. This could lead to a serious bilateral confrontation with respect to fisheries jurisdiction between the United States and Canada and would make it very difficult for the United States to cooperate effectively with Canada on a multilateral solution to fisheries problems at the Caracas Conference.

13. This would be most unfortunate since in the past close cooperation between the Canadian and United States Delegations in the preparatory committee for the Law of the Sea Conference and United Nations General Assembly has been very helpful in achieving objectives important to our national interest.

14. That a recall and stay of mandate of this Court pending the resolution of this dispute will permit the United States and Canadian Governments to continue their close cooperation in the Law of the Sea negotiations at the very critical Conference this summer in Caracas.

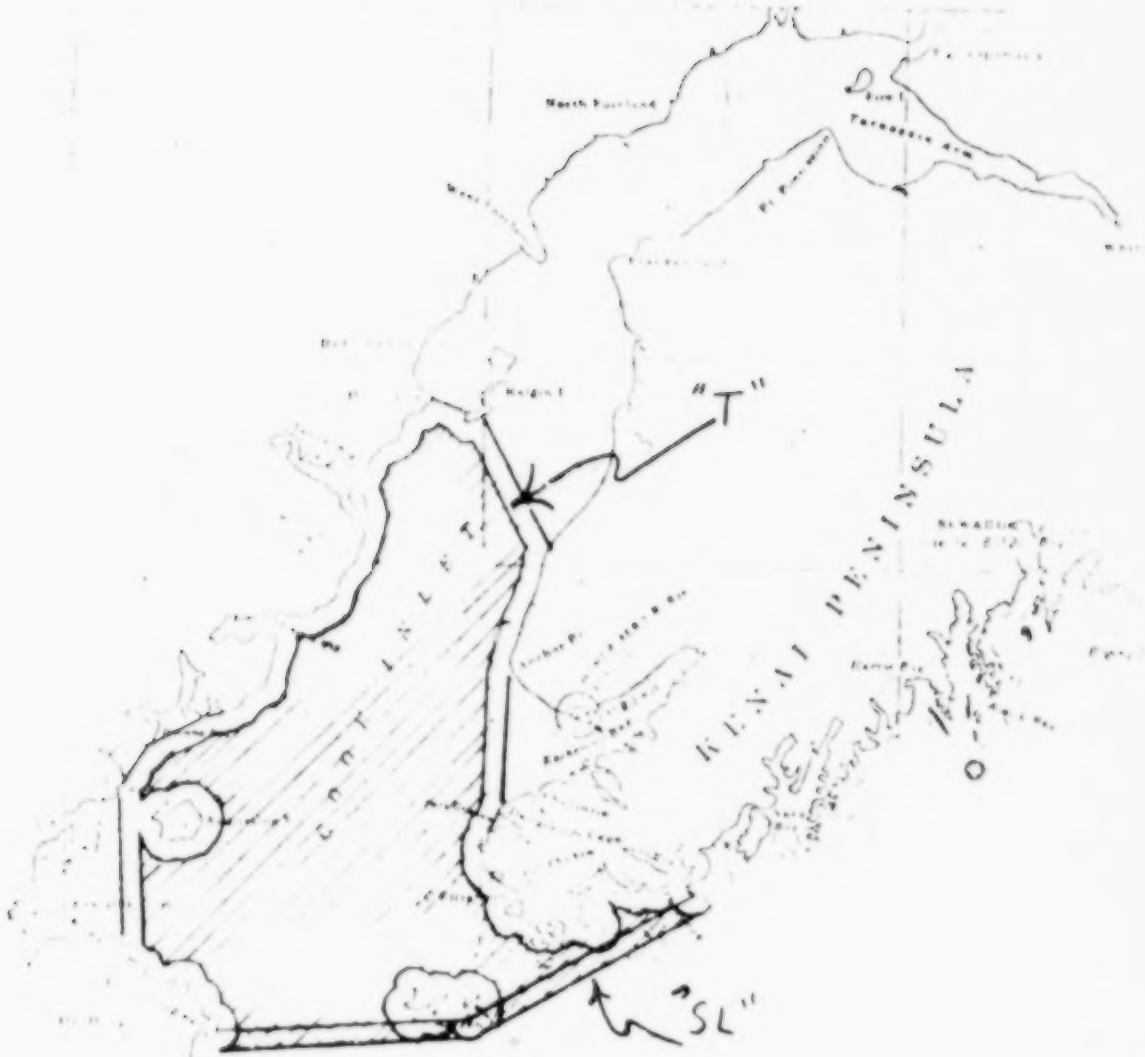
/s/ John R. Stevenson
JOHN R. STEVENSON

Subscribed and sworn to before me this 26th day of April, 1974.

/s/ Jacquelyn C. Jett
JACQUELYN C. JETT
Notary Public in and for
the District of Columbia

My Commission expires Nov. 30, 1978.

[SEAL]



BEST COPY AVAILABLE

HATCHED AREA SHOWS
AREA IN DISPUTE

APPENDIX J